No.__

In the Supreme Court of the United States

RITESH TANDON; KAREN BUSCH; TERRY GANNON; CAROLYN GANNON; JEREMY WONG; JULIE EVARKIOU; DHRUV KHANNA; CONNIE RICHARDS; FRANCES BEAUDET; MAYA MANSOUR,

APPLICANTS,

v.

GAVIN NEWSOM; ROB BONTA; TOMÁS J. ARAGÓN; JEFFREY V. SMITH; SARA H. CODY.

RESPONDENTS.

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Ninth Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR IN THE ALTERNATIVE FOR CERTIORARI BEFORE JUDGMENT OR SUMMARY REVERSAL

RELIEF REQUESTED BY SATURDAY, APRIL 3, 2021

ROBERT E. DUNN
J.D. TRIPOLI
EIMER STAHL LLP
99 S. Almaden Blvd.
Suite 642
San Jose, CA 95113
(408) 889-1690
rdunn@eimerstahl.com
jtripoli@eimerstahl.com

JOHN K. ADAMS
EMILY E. SULLIVAN
EIMER STAHL LLP
224 S. Michigan Ave.
Suite 1100
Chicago, IL 60604
(312) 660-7600
jadams@eimerstahl.com
esullivan@eimerstahl.com

RYAN J. WALSH
Counsel of Record
AMY MILLER
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 442-5798
rwalsh@eimerstahl.com
amiller@eimerstahl.com

Counsel for Applicants

QUESTION PRESENTED

In ordinary times, Pastor Jeremy Wong and Karen Busch regularly held Bible studies, prayer meetings, and worship services at their homes—as had millions of other Christians in California who sincerely believe assembling for small-group, "house church" fellowship is just as indispensable to their faith as attending Mass is for a Catholic. Yet for over a year now, California has completely prohibited or substantially restricted those "gatherings" and many others. Indoor gatherings are completely prohibited in Tier 1 counties and limited to no more than three households in Tiers 2, 3, and 4, while outdoor gatherings are limited to no more than three households in all tiers. By contrast, the State allows countless other activities to take place outdoors without *any* numerical limitations, from weddings and funerals to secular cultural events and political rallies. It also permits more than three households to congregate inside buses, trains, universities, airports, barber shops, government offices, movie studios, tattoo parlors, salons, and other commercial venues. Santa Clara County, where Wong and Busch live, is currently in Tier 3 and thus even restaurants and movie theatres can operate indoors at 50% capacity.

The question presented is: Whether California's restrictions on "gatherings" trigger and fail strict scrutiny under the Free Exercise Clause to the extent that they prohibit (or severely restrict) at-home religious gatherings—notwithstanding this Court's clear instructions that California "must place religious activities on par with the most favored class of comparable secular activities." App. 36 (Bumatay, J., dissenting).

PARTIES AND RULE 29.6 STATEMENT

Applicants are RITESH TANDON; KAREN BUSCH; TERRY GANNON; CAROLYN GANNON; JEREMY WONG; JULIE EVARKIOU; DHRUV KHANNA; CONNIE RICHARDS; FRANCES BEAUDET; MAYA MANSOUR. Applicants are the Plaintiffs in the United States District Court for the Northern District of California and Appellants in the United States Court of Appeals for the Ninth Circuit.

Respondents are GAVIN NEWSOM, in his official capacity as Governor of California; ROB BONTA, in his official capacity as the Acting Attorney General of California; TOMÁS J. ARAGÓN, in his official capacity as the Director of the California Department of Public Health; JEFFREY V. SMITH, in his official capacity as County Executive of Santa Clara County; SARA H. CODY, in her official capacity as the Health Officer and Public Health Director of Santa Clara County. Respondents are Defendants in the United States District Court for the Northern District of California and Appellees in the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

All decisions in the lower courts in this case are styled *Tandon v. Newsom*. The order of the United States Court of Appeals for the Ninth Circuit, dated March 30, 2021, denying Applicants' motion for an injunction pending appeal, over the dissent of Judge Bumatay, is attached hereto at App. 1. The order of the United States District Court for the Northern District of California, dated February 19, 2021, denying Applicants' motion for an injunction pending appeal is attached hereto at App. 53. The order of the United States District Court for the Northern District of

California, dated February 5, 2021, denying Applicants' motion for a preliminary injunction, which is the order on appeal in the court of appeals, is attached hereto at App. 54 and is also available at 2021 WL 411375. The transcript of the district court's hearing on Applicants' motion for a preliminary injunction is attached hereto at App. 134. The docket number in the United States District Court for the Northern District of California is 20-cv-07108-LHK, and the docket number in the United States Court of Appeals for the Ninth Circuit is 21-15228.

JURISDICTION

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292. This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS

The First Amendment provides in pertinent part:

> 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.

U.S. Const. amend. I.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPLICATION

TO THE HONORABLE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

This Court has issued *four orders* in just the past five months unequivocally holding that governments may not restrict the free exercise of religion—even in the name of fighting a pandemic—if comparable nonreligious activities are not subject to the same restrictions. Yet California—assisted by the Ninth Circuit, which has "disregard[ed] the lessons from [this] Court" and "turned a blind eye to discrimination against religious practice"—continues its rearguard action against the free (and safe) practice of religious faith. App. 32 (Bumatay, J., dissenting). Because of the State's recalcitrance and the Ninth Circuit's refusal to follow this Court's "clear and, by now, redundant" precedents, this Court's intervention is, unfortunately, once again necessary. App. 36 (Bumatay, J. dissenting).

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), this Court enjoined a New York executive order that imposed 10- and 25-person caps on houses of worship that were harsher than restrictions on secular businesses. The regulations—which were "far more restrictive than any COVID-related regulations that ha[d] previously come before the Court"—could not survive strict scrutiny because the State "offered no evidence that applicants [ ] contributed to the spread of COVID-19," and there were "many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Id.* at 67.

Undeterred, California continued to impose a *total prohibition* on indoor worship in Tier 1 counties—a restriction even more onerous than the regulations enjoined in *Diocese of Brooklyn*—despite allowing numerous indoor commercial activities. This Court put a stop to that unconstitutional practice in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*), and *Harvest Rock Church, Inc. v. Newsom*, – S. Ct. –, 2021 WL 406257 (Feb. 5, 2021) (*Harvest Rock Church III*). As Justice Gorsuch, joined by four other justices, explained, California's indoor worship ban "imposed more stringent regulations on religious institutions than on many businesses," and the State could not "thread the needle" of strict scrutiny because it failed "to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests." *South Bay II*, 141 S. Ct. at 717–19 (statement of Gorsuch, J.).

The *South Bay II* decision should have put California's autocrats on notice that the pandemic does not provide a license to squelch religious exercise while allowing other "essential" activities—*i.e.,* activities preferred by the State—to continue with fewer restrictions. But alas, like seed falling on rocky ground, the message did not take root. Mere weeks after *South Bay II*, the County of Santa Clara had the audacity to argue that *its* total prohibition of indoor worship was generally applicable and thus subject only to rational basis review. The County contended that its gathering ban did not discriminate against religious gatherings because it "prohibit[ed] *all* indoor gatherings of *all* kinds at *all* places." Br. of Santa Clara County in *Gateway City Church v. Newsom*, No. 20A138, at 19 (U.S. Feb. 24, 2021). But the County's bespoke

definition of gatherings did *not* encompass commercial activities that involved large numbers of people congregating indoors for secular activities, making the County's restriction on worship every bit as discriminatory in operation as the State's. This Court made short work of the County's argument, granting the application for injunctive relief on the ground that the "outcome [was] clearly dictated by this Court's decision in *South Bay [II].*" *Gateway City Church v. Newsom*, – S. Ct. –, 2021 WL 753575, at *1 (Feb. 26, 2021).

Given this string of decisions, a reasonable observer might have expected California to be especially solicitous of the rights of believers, if simply to avoid the *appearance* of naked hostility to religion. But that is not the path the State has chosen. Instead, the State continues to enforce its onerous restrictions on "gatherings" to prohibit or sharply restrict religious gatherings to study the Bible, pray, and worship communally *in the very place "accorded special consideration in our Constitution, laws, and traditions"*—the home. *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 501 (1994) (emphasis added). The State defines gatherings as "social situations that bring together people from different households at the same time in a single space or place." App. 190. For practical purposes, that definition is equivalent to the one put forward by Santa Clara County, which defined a gathering as "an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and

in a coordinated fashion." 4-ER-879.[1]

By distinguishing between "social situations" and commercial activities, the State—like the County before it—accomplishes a subtle but unmistakable religious gerrymander, conveniently excluding business gatherings from the definition of prohibited activity, even though people from many different households are allowed to be in the same place at the same time in restaurants, buses, salons, movie theaters, airports, trains, movie studios, government offices, barbershops, tattoo parlors, and elsewhere. In addition to this definitional sleight of hand, the State explicitly exempts certain activities from the gatherings ban. For example, the State allows weddings and funerals to occur outdoors with no numerical limits. It likewise allows unlimited numbers of people to engage in political protests and rallies outdoors, even though social distancing is largely impossible, shouting is common, and mask wearing infrequent at such events. The State also allows people to gather outdoors in unlimited numbers at "houses of worship," giving some measure of protection to more traditional, ritualistic faith practices. But it does not permit an individual to gather with others in her own backyard to study the Bible, pray, or worship with members of more than two other households, all of which are common (and deeply important) practices of millions of contemporary Christians in the United States.

[1] Citations of evidentiary materials—primarily expert declarations and numerous government orders—are made through citation of the Ninth Circuit Excerpts of Record, located at *Tandon v. Newsom*, No. 21-15228 (CA9) ECF No. 13.

The State's treatment of indoor activities is equally discriminatory. In Tier 1, indoor home-based religious gatherings are completely prohibited, while people may cluster at hair salons, barbershops, retail stores, "[p]ersonal [c]are [s]ervices" businesses, App. 183–84, and for work in the entertainment industry, 5-ER-922–23. In Tiers 2 through 4, indoor home-based religious gatherings are limited to three households, regardless of the size of the building or the safety procedures followed. Yet in Tier 2 the State continues to allow gatherings in "[p]ersonal [c]are [s]ervices" businesses, which include nail salons, tattoo parlors, piercing, and skincare salons, App. 184; 4-ER-757–83 (personal care services), and further permits crowds at museums, zoos, aquariums, movie theaters, and gyms, App. 184–85. In Tiers 3 and 4, even restaurants, wineries, breweries, cardrooms, distilleries, and bowling alleys can host gatherings indoors. App. 185–86. Yet in-home religious gatherings are still restricted to no more than three households. App. 183.

Under these rules, Pastor Wong and Karen Busch can sit for a haircut with 10 other people in a barbershop, eat in a half-full restaurant (with members of 20 different families), or ride with 15 other people on a city bus, but they cannot host three people from different households for a Bible study indoors or in their backyards. The State thus treats religious exercise far more harshly than secular activities.

Notwithstanding the State's clear discrimination against religious exercise, the Ninth Circuit applied rational basis to the Gatherings Guidance and denied Applicants' request for an injunction pending appeal. App. 27. The Court reached that head-scratching result based on its conclusion that "in-home secular and religious

gatherings are treated the same." App. 27. But the State's decision also to disfavor some *nonreligious* activity—such as in-home birthday parties or Super Bowl gatherings—does not save the State's Gatherings Guidance from strict scrutiny, as this Court has explained, repeatedly, in *Diocese of Brooklyn*, *South Bay II*, *Harvest Rock*, and *Gateway City Church*. Instead, "regulations must place religious activities on par with the most favored class of comparable secular activities, or face strict scrutiny" App. 36 (Bumatay, J., dissenting) (citing *Diocese of Brooklyn*, 141 S. Ct. at 66–67). And none of those precedents suggests that the Free Exercise Clause applies only to formally established "houses of worship," or that businesses and government services are not proper comparators to private homes with respect to the risk of infection, as the panel majority concluded. On the contrary, this "Court's prior decisions 'clearly dictated' enjoining the restrictions," but the Ninth Circuit "*again* fail[ed] to apply [those] precedents"—"[a]t this point, a tale as old as time." App. 36 (Bumatay, J., dissenting).

Because the State treats religious exercise worse than comparable secular activities, the Gatherings Guidance is subject to strict scrutiny. It fails that rigorous review for the same reasons as the government orders in *Diocese of Brooklyn*, *South Bay II*, and *Gateway City Church*. While the State contends that in-home religious gatherings are riskier than other types of allowable social interactions, it has not demonstrated that the risk factors it identifies are "always present" at such gatherings or that they are "always absent from the other secular activities its regulations allow." *South Bay II*, 141 S. Ct. at 718 (Statement of Gorsuch, J.). Nor

has the State been able to "explain why it cannot address its legitimate concerns with rules short of a total ban." *Id.* Wong and Busch have both attested that they could host gatherings safely, and there is no reason why the State could not allow such gatherings to occur with the use of masks, social distancing, regular sanitizing, and ventilation (*e.g.*, open windows). App. 197, 201, 204–05, 207. More fundamentally, the State has not explained why it could not achieve its goals of reducing sickness and death from COVID-19 by relaxing its community-wide restrictions and focusing its protective efforts on those most vulnerable to the disease. Many other states have employed less restrictive measures to combat the pandemic with equal or superior health outcomes. California is not obligated to embrace liberty to the same extent as other states to which its citizens have been fleeing, but when it comes to core First Amendment activities, California is not free to choose the *most* restrictive means of pursuing its legitimate goals.

Given the blatant First Amendment violation here, this Court should not hesitate to enjoin the Gatherings Guidance to the extent it applies to religious gatherings at the home. These gatherings are central to Wong's and Busch's religious exercise, and the deprivation of their First Amendment rights even for a limited time constitutes irreparable harm. The public interest also strongly favors injunctive relief. Although the virus is still circulating at low levels in California—as it likely always will—the public health system is not under any strain, and there are currently fewer people hospitalized with COVID-19 than at any point in the past year. Millions of Californians, including the most vulnerable, have been vaccinated, and millions

more have already recovered from infection—or were infected but had no symptoms—and thus have acquired at least temporary immunity. In other words, an injunction here will not harm public health. Indeed, since this Court granted the injunctions in *South Bay II* and *Gateway City Church*, California has continued to see a steady decline in the number of deaths, hospitalizations, and confirmed cases.

For all these reasons, pursuant to Rules 20, 22, and 23 of the Rules of this Court and 28 U.S.C. §1651, Applicants respectfully request that the Circuit Justice grant this Application for an injunction precluding Respondents from enforcing the Gatherings Guidance to the extent it applies to religious gatherings in the home to study the Bible, pray, worship, and otherwise gather for communal religious exercise. Applicants ask that the injunction remain in effect until such time as the State's Gatherings Guidance is permanently withdrawn, repealed, or invalidated by a court. Because Wong and Busch hope to be able to hold Bible studies and prayer meetings on Easter and throughout the Easter season (the most important holiday season in Christianity), ***they request that an injunction issue on Holy Saturday, April 3, 2021, or as soon thereafter as is practicable***.

STATEMENT OF THE CASE

A. Applicants Wong And Busch Seek To Hold Religious Gatherings In Their Homes

Pastor Jeremy Wong and Karen Busch want to host small in-person Bible studies in their homes, as both had done regularly for over two years before the pandemic. App. 196, 200. If allowed to hold such gatherings, they could (and would)

employ social distancing and other mitigation measures. App. 197, 291. Yet for more than a year, the State has prohibited Wong and Busch from hosting religious gatherings in their own homes. App. 196–97, 200–01, 204, 207.

"Communal worship, congregational study, and collective prayer are central tenets of [their] faith[s]" and "are impossible to replicate in an online format." App. 197, 201. "The Bible commands …certain activities such as singing and gathering in-person." App. 197. "An online or virtual sermon cannot replicate God's presence among an assembled church." App. 197, 201. Matters are even worse for the members of Busch's religious gatherings who do not have computers and are relegated to participating over the phone. App. 201.

B. The State Restricts Religious "Gatherings" But Allows Indoor And Outdoor Secular Activities

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. 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-624. 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. 4-ER-624; 4-ER-815; *see also Tandon*, No. 21-15228 (CA9) Dkt.

14 Ex. 2.[2] 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, or six-months' imprisonment. Cal. Gov't Code § 8665; 4-ER-620; 4-ER-624.

The California Department of Public Health used its new power to impose and then eliminate several regulatory frameworks 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-645–48; 4-ER-650–55. Applying these metrics, the Blueprint color-codes each tier as follows: Purple Tier 1 (Widespread); Red Tier 2 (Substantial); Orange Tier 3 (Moderate); Yellow Tier 4 (Minimal). 4-ER-645–46; 4-ER-651.

The Blueprint determines for each tier whether various activities can occur indoors and/or outdoors and at what capacities. *See* App. 183–89. Even in Tier 1, the State allows certain businesses to operate indoors, such as hair salons, retail stores and shopping centers (at 25% capacity), personal care services, hotels, "[l]imited

[2] Applicants submitted a request for judicial notice to the Ninth Circuit on March 9, 2021 to update the court on the State's recent changes to its COVID-19 orders.

[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."[3] *Id.*; 5-ER-915–27. In Tiers 2–4, the State allows gatherings in "[p]ersonal [c]are [s]ervices," which include nail salons, tattoo parlors, piercing, and skincare services, App. 184; 4-ER-757–83 (personal care services), and further permits crowds at museums, zoos, aquariums, movie theaters, and gyms, App. 184–85. And in Tiers 3 and 4 even restaurants, wineries, breweries, cardrooms, distilleries, and bowling alleys can host gatherings indoors. App. 185–86.

The State has also issued changing guidance on "gatherings." It defines "gatherings" to mean "social situations that bring together people from different households at the same time in a single space or place." App. 190. On March 16, 2020, CDPH banned all indoor and outdoor gatherings "across the state of California[.]" 4-ER-825. Six months later, the State "updated" this guidance but maintained its statewide ban on gatherings "unless otherwise specified." 4-ER-828. On October 9, 2020, the State banned private indoor gatherings entirely and restricted outdoor gatherings to no more than three households in a two-hour period, provided that the venue allows six-foot physical distancing. 4-ER-831. On November 13, it again updated its guidance, prohibiting all indoor gatherings for counties in Tier 1, prohibiting gatherings in other tiers "that include more than 3 households," and

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

prohibiting "singing, chanting, shouting, cheering, and similar activities" at indoor gatherings. App. 190–94; *see also* App. 183–89.

On February 5, 2021, in *South Bay II*, this Court enjoined the State's prohibition on indoor worship services in Tier 1 on the grounds that it violated the Free Exercise Clause. 141 S. Ct. at 716. In response, the State amended the Blueprint to allow indoor services at "places of worship" at up to 25% capacity in Tiers 1 and 2. *Tandon*, No. 21-15228 (CA9) Dkt. 14 Ex. 2. The State also now allows "[w]edding ceremonies" and "cultural ceremonies" to be held indoors with a maximum of 25% capacity in Tier 1 (the State had previously prohibited these indoor gatherings in Tier 1). *Id*. at Ex. 4. Outdoor political rallies and protests, wedding ceremonies, cultural ceremonies, and services at places of worship are not currently subject to capacity limitations by the State. *Id*. Exs. 2 and 4; 4-ER-818–19.

Despite Respondents' revisions and Santa Clara's movement to Tier 3 on March 24, 2021, 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." *Tandon*, No. 21-15228 (CA9) Dkt. 14 Exs. 2 and 4; App. 183–89. The exempted gatherings may be held indoors up to 50% capacity or 200 persons, whichever is less, and outdoors with no capacity restrictions. *Id.*

C. Procedural History

Applicants' complaint, filed on October 13, 2020, claims that Respondents' 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.[4] On October 22, 2020, Applicants moved for a preliminary injunction. Applicants Wong, Busch, Tandon, and the Gannons sought to enjoin the State of California and Santa Clara County from enforcing the Gatherings Guidance against their First Amendment-protected gatherings. Tandon (a congressional candidate) and the Gannons seek to hold campaign fundraisers and in-home political discussions, while Wong and Busch seek to hold in-home religious gatherings. Evarkiou, Khanna, Mansour, Beaudet, and Richards seek to operate their small businesses.

The district court denied Applicants' motion for a preliminary injunction on February 5, 2021. App. 54. Addressing Applicants' free exercise claims, the district court upheld the orders, concluding that they were neutral, generally applicable, and rationally related to a legitimate government interest. *Id*. at 121–25. In the alternative, the court held that the orders were narrowly tailored to achieve a compelling government interest. *Id*. at 126. Addressing the other preliminary-injunction factors, the district court concluded that the State's restrictions on gatherings irreparably harmed Wong and Busch but that an injunction was not in the public interest because public health would be "endangered" if Defendants' Orders were enjoined. *Id*. at 126–32.

[4] While Applicants continue to assert their free speech, equal protection, and due process claims on appeal in the Ninth Circuit, their Application in this Court is limited to the free exercise claim.

Applicants appealed the district court's decision to the Ninth Circuit and filed a motion in the district court to enjoin the orders pending appeal. The district court denied this motion in a one-sentence order on February 19, 2021. *Id*. at 53. Applicants subsequently filed an emergency motion for injunction pending appeal in the Ninth Circuit, which was denied on March 30, 2021. *Id*. at 30.

The Ninth Circuit motions panel concluded that Applicants had not demonstrated a likelihood of success on the merits of any of their claims. With respect to the free speech and assembly claims asserted by Tandon and the Gannons, the panel determined that an injunction was "unnecessary" because "the State's gatherings restrictions do not apply to Tandon's requested political activities, and given the State's failure to define rallies or distinguish Tandon's political activities from the Gannons' political activities . . . the State's restrictions do not apply to the Gannons' political activities." *Id.* at 28–29.

The panel disagreed as to whether Applicants are entitled to an injunction on their free exercise claims. The majority held that "rational basis review should apply to the State's gatherings restrictions because in-home secular and religious gatherings are treated the same, and because [Applicants] … have not provided any support for the conclusion that private gatherings are comparable to commercial activities in public venues in terms of threats to public health or the safety measures that reasonably may be implemented." *Id*. at 27. Because the majority determined that Applicants had not established a likelihood of success, it declined to address

whether they were experiencing irreparable harm or whether an injunction was in the public interest. *Id.* at 27 n.12.

Judge Bumatay dissented from the majority's resolution of the free exercise claim. He would have "grant[ed Applicants Wong and Busch] their requested injunction pending appeal of their religious freedom claim[s]" because "California has clearly infringed on Wong and Busch's free exercise rights." *Id.* at 32 (Bumatay, J., dissenting). Judge Bumatay concluded that strict scrutiny applies to the orders because they "disparately impact[] religious practice compared to analogous secular conduct," which the State was unable to satisfy. *Id.* at 37–38. Judge Bumatay also determined that the loss of religious freedom constituted irreparable harm and that an injunction is in the public interest because "[n]othing in the record supports the view that Wong's and Busch's in-home worship is more dangerous for the spread of COVID-19 than the operation of other businesses open for customers without household caps." *Id.* at 51–52.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without its order "be[ing]

construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014). This Court has previously granted injunctive relief when applicants "have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Diocese of Brooklyn*, 141 S. Ct. at 66; *see also South Bay II*, 141 S. Ct. at 719. A Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal).

I. The Violation Of Wong's And Busch's Free Exercise Rights Is Indisputably Clear, And The Lower Courts Grossly Misapplied This Court's Recent Decisions In *Diocese of Brooklyn*, *South Bay II*, And *Gateway City Church*, Causing Confusion As To The Scope Of Those Decisions.

The First Amendment declares that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. As this Court has explained, "the 'exercise of religion'" protected by the First Amendment "often involves not only belief and profession but the performance of (or abstention from) physical acts," including "assembling with others for a worship service." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *accord*

South Bay II, 141 S. Ct. at 718 (statement of Gorsuch, J.) ("[W]orshippers may seek only to … study in small groups.").

Although this Court has held that religious exercise concerns do not generally "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" *Smith*, 494 U.S. at 879, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). A law is not neutral or generally applicable if it is underinclusive, meaning the law "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*. at 543; *see Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) ("Whether [nonreligious] conduct is analogous" is "measured against the *interests* the State offers in support of its restrictions on conduct."). In other words, a law is underinclusive if it exempts nonreligious conduct from its purview while failing to give the same treatment "to cases of 'religious hardship.'" *Lukumi*, 508 U.S. at 537. The analysis for neutrality and general applicability is similar because "[they] are interrelated, and … failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id*. at 531.

The application of these principles to COVID-related restrictions is straightforward because courts are "no longer writing on a blank slate." App. 33 (Bumatay, J., dissenting). This Court has reiterated *four times* this term that a law

treating religious activities less favorably than "comparable" nonreligious activities (including commercial activities) triggers strict scrutiny. *Diocese of Brooklyn*, 141 S. Ct. at 66–68; *South Bay II*, 141 S. Ct. at 716; *Harvest Rock Church III*, 2021 WL 406257 at *1; *Gateway City Church*, 2021 WL 753575 at *1. This is true *regardless* of whether the law also treats some nonreligious activities just as unfavorably. *Diocese of Brooklyn*, 141 S. Ct. at 73 (Kavanaugh, J., concurring); *South Bay II*, 141 S. Ct. at 718–19 (Statement of Gorsuch, J.). Indeed, the "instructions provided by [this] Court are clear and, by now, redundant." App. 36 (Bumatay, J., dissenting). "[R]egulations must place religious activities on par with the most favored class of comparable secular activities, or face strict scrutiny," and secular "businesses are analogous comparators" when they involve comparable social interactions. *Id.*

A. The Gatherings Guidance Burdens Wong's And Busch's Free Exercise Rights

Before the pandemic, both Wong and Busch hosted weekly in-person Bible studies and communal worship in their homes with groups of eight to twelve individuals. App. 196 ¶¶2–3; App. 200 ¶¶2–3. The State's Gatherings Guidance now prevents them, and millions of others, from gathering in their home 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, while Santa Clara County was in Tier 1, such gatherings *in their home* have been forbidden completely. This is because the State defines "gatherings" as "social situations that bring together people from different households at the same time in a single space or place." App.

190. Encompassed within this definition are religious gatherings held in the privacy of a home or backyard. Although the State now allows indoor religious gatherings at "houses of worship"—thanks to this Court's repeated interventions—the State does not consider a home to be a "house of worship." At the hearing on Plaintiffs' motion for preliminary injunction, the State insisted that rules applicable to "houses of worship" do not apply to home-based religious gatherings because houses are not zoned the same way as churches. App. 166–67; *see also* App. 80 ("[T]he Court notes that Plaintiffs' free exercise claims do not challenge restrictions on houses of worship."). Thus, while churches, synagogues, and mosques in Santa Clara County are now allowed to hold indoor gatherings with up to 50% capacity given the County's recent move to Tier 3, Wong and Busch still cannot invite more than two other households, which typically means two other people, to their home for a Bible study, prayer meeting, or worship service. And while such religious gatherings could be held in their backyards, *even outdoors* the State limits "gatherings" to no more than three households. App. 183.

Both Wong and Busch offered uncontroverted declarations attesting that in-person communal religious assembly, study, and worship are indispensable to their faith, App. 197 ¶5; App. 201 ¶5, just as those same practices are to numerous other practitioners of contemporary Protestant Christianity. *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"). Remote worship, moreover, is an

inadequate substitute because not every member of their faith communities has access to such technology. *See* App. 197 ¶5; App. 201 ¶5. Yet carrying out those necessary, in-person activities with more than two other co-religionists today, even with the use of masks and social distancing, is a crime. 4-ER-620–21 (citing Cal. Gov't Code § 8665). The burdens imposed on Wong and Bush thus easily trigger review under the First Amendment, and neither the district court nor court of appeals concluded differently. *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); *Diocese of Brooklyn*, 141 S. Ct. at 66–67 (caps on religious worship triggered First Amendment scrutiny); *see also 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 Christian practices "to subtle forms of discrimination").

A. The Gatherings Guidance Does Not Apply Equally, As Even The Ninth Circuit Apparently Recognized, And Thus Is Subject To Strict Scrutiny

The Gatherings Guidance is substantially underinclusive, and thus it is neither neutral nor generally applicable. *See Lukumi*, 508 U.S. at 536–37, 543. The State allows a broad swath of "comparable" activities to occur, both indoors and outdoors, that implicate its purported interest in combatting the spread of COVID-19, while simultaneously prohibiting the in-home religious gatherings that both Wong and Busch wish to hold. *See Diocese of Brooklyn*, 141 S. Ct. at 66–68.

1. For example, while backyard Bible studies are limited to three households, weddings, funerals, "cultural events," political protests and rallies, and services at conventionally defined "houses of worship" are allowed outdoors without any numerical limit—even when a county is in Tier 1. App. 3–4, 11; *Tandon*, No. 21-15228 (CA9) Dkt. 14 Ex. 2. For counties in either Tier 1 or 2, California citizens may further congregate outdoors at "wineries [or] breweries," "kart racing [or] mini golf," and "sports [or] live performances"—generally without any numerical limit. App. 185–87 (cleaned up). People may further muster outdoors in either tier at "movie theaters," "gyms," "restaurants," "museums," "zoos," and more without numerical limits. App. 184–88 (cleaned up). For counties in Tier 3, like Santa Clara County, California citizens may additionally go to "[b]ars" outdoors. App. 186. Thus, although Wong or Busch could watch John Legend *sing* outdoors at one of their favorites bars or wineries, they cannot host their faith community *in their backyard* for worship, prayer, or Bible study.

The State also allows people to congregate *indoors* in numerous comparable venues and for various purposes. For example, in both Tier 1 and Tier 2, people may patronize "hair salons [or] barbershops," "all retail," and "personal care services." App. 183–84 (cleaned up). "'Personal care services' include many businesses where hours-long physical proximity and touching is required, such as nail salons, tattoo parlors, body waxing, facials and other skincare services, and massages." App. 38–39 (Bumatay, J., dissenting) (citing California Industry Guidance). People can also gather indoors if they are involved in "[c]ritical infrastructure," App. 183, as well as

if they work in the entertainment industry, at a studio, or in a related establishment. *See* 5-ER-922–23; *Tandon*, No. 21-15228 (CA9) Dkt. 14 Ex. 4; *see South Bay II*, 141 S. Ct. at 719 (Statement of Gorsuch, J.) (noting that the "powerful entertainment industry" earned "exemption[s]" in the State's COVID regime). For counties in Tier 3, in addition to those activities, people may assemble in "cardrooms [or] satellite wagering" places, "offices," or "bowling alleys." App. 186 (cleaned up). Thus, although Wong or Busch could contract out their home to Netflix for the filming of *Warrior Nun* with dozens of stagehands and actors inside, they could not host a nun and two other people from different households for an ecumenical prayer meeting. The State also "allows people to sit in relatively close proximity inside buses," "train[s]," and airports. *South Bay II*, 141 S. Ct. at 718 (Statement of Gorsuch, J.). But five people studying the Book of Exodus in a living room is a criminal affair.

2. All of these secular gatherings are "comparable" to home-based religious gatherings. What matters under the Free Exercise Clause is whether the exempted activities carry analogous or comparable risks of harm, such that exempting them "undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (citing *Lukumi*, 508 U.S. at 543–46); *accord South Bay II*, 141 S. Ct. at 718 (listing comparators, such as "train stations" or "retailers," that present same risks of COVID spread); *Monclova Christian Academy*, 984 F.3d at 480 ("[C]onduct is analogous" as "measured against the *interests* the State offers in support of its restrictions on conduct."); *Yellowbear v. Lambert*, 741 F.3d 48, 60 (10th

Cir. 2014) (Gorsuch, J.) ("[U]nderinclusiveness" means a "failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest."). In this case, the exempted nonreligious activity *is* comparable to in-home religious conduct because both present the same risks of viral spread that California is purportedly trying to prevent.

The panel majority stated without evidence that "when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting" and "that participants in a social gathering are more likely to be involved in prolonged conversations." App. 19. But there is no evidence to support that speculative assertion. After all, the State allows customers to be in "the close physical proximity of hairstylists or manicurists" who "touch and remain near [their customers] for extended periods," while others wait inside for their appointments. *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.); *accord* App. 39 (Bumatay, J., dissenting) ("Some personal care services may even allow their clients to forego masking."). The State also permits "scores [of people to] pack into train stations or wait in long checkout lines" at retail stores and airports. *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.). And the State does not impose any limits on the amount of time people can sit on a bus, eat in a restaurant, or film inside a movie studio.

The panel majority further stated—in the face of evidence to the contrary—that "private houses are typically smaller and less ventilated than commercial establishments" and "that social distancing and mask-wearing are less likely in

private settings and enforcement is more difficult." App. 19. But both Wong and Busch offered uncontroverted declarations attesting that they could "hold communal gatherings in a way that protects [their] guests." App. 197 ¶6; App. 201 ¶6. Wong, for instance, owns "large outdoor spaces" where he can host "in-person gathering[s] … where attendees could socially distance by more than six feet." App. 197 ¶6. And their guests *would wear* "masks, gloves, screens, or other devices to protect and inhibit the spread of COVID-19." *Id.*; App. 201 ¶6. They could (and would) also adopt many of the same safety and sanitizing measures that the panel majority championed for industries, including personal care services, that the State permits to open. *Compare* App. 20–22, *with* App. 197 ¶6; App. 201.

In all events, the panel's opinion itself demonstrates that the State's orders are underinclusive. According to the panel majority, indoor "political activities"—including "debates, fundraisers, [] meet-the-candidate events," and "small-group political discussions"—are exempted from the State's orders. App. 28–29. The upshot of the panel's opinion is thus that the Gannons can gather with more than three households for political discussions—such as whether Governor Newsom should be recalled—but Wong and Busch are prohibited from gathering to discuss Christ's admonition to "render unto Caesar." *See* Matthew 22:21–23. The indoor political discussions that the Gannons are now allowed to have undeniably involve the same risks of harm that the State offers in support of its restrictions. Other allowable First-Amendment activities, including gatherings for rallies and protests, involve even

greater risks of spread, as these gatherings can involve enormous crowds, shouting, and limited mask wearing.[5] App. 24–25.

The panel majority's holding makes even less sense now that Santa Clara County is in Tier 3. There is zero evidence that an indoor Bible study is riskier than a trip to the movies, dinner in a restaurant, a workout in a gym, or a gathering with dozens of friends at a winery, brewery, distillery, or bowling alley.

To be sure, judges are "not scientists," *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.), but it does not require any special expertise to appreciate that the exempted conduct—*e.g.*, movie studios filming in private homes, tattoo parlors operating in narrow spaces, or hairstylists touching their customers—presents the same risks of viral spread as indoor religious gatherings. "[T]he State's present determination," in other words, "appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." *Id.* at 717 (Roberts, C.J., concurring).

[5] With little explanation, the panel majority inserted ambiguity into "rally" and "protest" under the State's orders by arbitrarily defining them as occurring only in "public spaces." App. 24–25. But "rally" and "protest" are not limited to "public spaces." *See, e.g.*, "Rally," Merriam-Webster, https://tinyurl.com/ybwu22hc ("[T]o muster for a common purpose."). And, in all events, the "government officials who created California's complex regime" should not be permitted "to benefit from its confusing nature." *South Bay II*, 141 S. Ct. at 719 n.2 (statement of Gorsuch, J.). And even if there is ambiguity here, and there is not, the rule of lenity favors Wong and Busch—not the State—because the State's order subjects its transgressors to criminal punishment. 4-ER-620–21; *see United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).

The State argued below that its ban on in-home religious services is justified because it applies to all private gatherings whether secular or religious. The panel majority agreed, holding that "[w]hen compared to analogous secular in-home private gatherings, the State's restrictions on in-home private religious gathering are neutral and generally applicable and, thus, subject to rational basis review." App. 8. But that is the very argument this Court rejected in *Gateway City Church*. There, the County insisted that *its* ban on indoor gatherings did not trigger strict scrutiny because it "prohibit[ed] *all* indoor gatherings [] regardless of where they occur and regardless of purpose." Br. of Santa Clara County in *Gateway City Church v. Newsom*, No. 20A138, at 19 (U.S. Feb. 24, 2021). Because the County, like the State, permitted secular business activities that present the same risk of infection as other types of "gatherings," this Court unceremoniously rejected that argument and enjoined the County's order as to indoor worship services, holding that "[t]his outcome is clearly dictated by … [*South Bay II*]." *Gateway City Church*, 2021 WL 753575, at *1. There is no daylight between the State's orders here and the County's order in *Gateway City Church*.

Because California "impos[es] more stringent regulations on religious [gatherings] than on many businesses" or other types of conduct that present the same risk of transmitting COVID-19, its orders are subject to strict scrutiny. *South Bay II*, 141 S. Ct. at 717–18 (statement of Gorsuch, J.).

B. The State's Three-Household Limit On Religious Gatherings Cannot Survive Strict Scrutiny

"Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that the law is "justified by a compelling governmental interest and … narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. The State's orders fail strict scrutiny because there are far less restrictive options available to advance the State's asserted interest in combatting the spread of COVID-19.

For example, the State allows dozens or even hundreds of people to congregate in various commercial and government settings with basic precautions—masking and social distancing—that could be employed in the home. *See* App. 183–89. Both Wong and Busch 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." App. 197 ¶6; App. 201 ¶6; *see also* App. 48 (Bumatay, J., dissenting) (explaining that Wong and Busch can sanitize just like "nail parlors and other small business). The State has never explained why the same mitigation measures that allow hundreds of people to shop in a Wal-Mart, wait in an airport terminal, eat at a restaurant, or ride a bus, could not be used to responsibly host religious gatherings—both indoors and outdoors.

The State also employs percentage capacity restrictions that allow larger gatherings in larger spaces. Similar restrictions could be employed for in-home

gatherings. For example, movie theatres and restaurants in Santa Clara County are currently allowed to operate at 50% capacity (or 200 people, whichever is fewer), App. 184–85, and the State does not explain why a similar limitation could not be applied to religious gatherings in the home.

The State argued below that religious gatherings are inherently more risky than other types of commercial activity, but this Court rejected the exact same argument in *South Bay II*. There, the State attempted to defend a similar restriction against houses of worship 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. California 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*. 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 logic of *South Bay II* "applies with equal force to worship and prayer within the home." App. 43 (Bumatay, J., dissenting). Although the State applied eight "objective criteria" to purportedly show that private, in-home gatherings greatly risk the spread of COVID-19, "these criteria are nearly word for word the same ones rejected" by *South Bay II*. *Id*. In short, it is simply not the case that these factors "are always present in [private gatherings] or always absent from other [] activities [the] regulations allows." *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.).

Nor has the State "explain[ed] why it cannot address its legitimate concerns with rules short of a total ban." *Id*. The panel majority's broad and unsupported factual conclusions concerning private gatherings could equally apply to "the close physical proximity of hairstylists or manicurists" who California allows to operate while "they touch and remain near [their customers] for extended periods." *Id*. at 718; *accord* App. 39–40 (Bumatay, J., dissenting) (discussing personal care services and tattoo parlors).

The State also "allows people to sit in relatively close proximity inside buses," airports, and trains. *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.). The State has decided that less restrictive options are available for these settings—including "social distancing requirements, masks, cleaning, plexiglass barriers, and the like"—yet it has persisted in completely banning (or severely limiting) First Amendment-protected gatherings regardless whether such precautions are used. *Id*. at 718–19; *accord* App. 44 (Bumatay, J., dissenting). And though the panel majority raised the specter that social gatherings may last longer, App. 19, the State does "not

limit … citizens to running in and out of other establishments." *South Bay II*, 141 S. Ct. at 719 (statement of Gorsuch, J.). "[N]o one is barred from lingering in shopping malls, salons, or bus terminals." *Id.* And if "the State is truly concerned about the 'proximity, length, and interaction' of private gatherings, as it claims, it could regulate those aspects of religious gatherings in a narrowly tailored way" by applying the same rules it affords to "barbershops, tattoo … parlors," and more. App. 44 (Bumatay, J., dissenting). The State has yet to explain its decision to adopt a total ban (or three household cap) rather than placing a "reasonable limit" on the length of indoor religious gatherings. *South Bay II*, 141 S. Ct. at 719 (statement of Gorsuch, J.).

The panel majority opined that these less restrictive options are not practicable because the Fourth Amendment prevents the government from entering private homes "at will" to enforce masking and social distancing restrictions. App. 22. But as Judge Bumatay recognized, the fact that private homes cannot be regulated as easily as private industry cuts in precisely the opposite direction. App. 48 (Bumatay, J., dissenting). If the State cannot require mask wearing and social distancing inside the home because of the special privacy interests at stake, surely the far *more* draconian step of banning or significantly curtailing gatherings in the home should be constitutionally off limits. *See City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (recognizing the "special respect for individual liberty in the home [that] has long been part of our culture and our law," including the "special resonance" for individual liberty "when the government seeks to constrain a person's ability to *speak* there").

As this Court has repeatedly recognized, "the home is sacred in Fourth Amendment terms not primarily because of the occupants' possessory interests in the premises, but because of their privacy interests in the activities that take place within." *Segura v. United States*, 468 U.S. 796, 810 (1984); *accord U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 501 (1994) ("[T]he privacy of the home … is accorded special consideration in our Constitution, laws, and traditions."). Yet instead of providing special deference for religious activities within the sanctity of the home, the State has imposed restrictions typically associated with authoritarian regimes that asylees try to escape. *See, e.g.*, *Jin Yun Xiao v. Att'y Gen. of U.S.*, 230 F. App'x 139, 141 (3d Cir. 2007) (remanding claims for asylum where Chinese police came to a resident's home "when she was leading a Bible study group, threatened and cursed her, and accused her of holding an illegal gathering").

Finally, the order fails narrow tailoring because to the extent the State is seeking to reduce sickness, hospitalizations, and death, there are far less restrictive means available than a blanket restriction on gatherings. Specifically, as Applicants' experts explained, the State could target its 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 ¶¶95–104. The State could further implement increased testing for workers at these locations, reduce staff rotations, and test visitors. 2-ER-182–83 ¶¶100–02; 2-ER-140 ¶51. Other States have avoided the level of adverse health outcomes California has suffered while

imposing far less draconian restrictions on gatherings than California. *See* 2-ER-129 ¶23; 2-ER-177–78 ¶89.[6]

C. The Ninth Circuit's Decision Cannot Be Squared With This Court's Recent Opinions And Sows Confusion Regarding The Scope Of The First Amendment's Protections

Apart from *South Bay II* and *Gateway City Church*, the decision by the panel majority betrayed a fundamental misunderstanding of the First Amendment which, if allowed to stand, would sow confusion in the lower courts. Specifically, the panel majority declined to follow *Diocese of Brooklyn*, *South Bay II*, and *Gateway City Church* because it concluded that these precedents apply only to "houses of worship." App. 12. In the words of the panel majority, this Court "compared religious activity to commercial activity" only "in the context of comparing public-facing houses of worship to public-facing businesses." App. 14. But "[b]y limiting these precedents to houses of worship, the majority loses sight of *why* houses of worship are protected at all: because of the religious exercise that occurs therein." App. 46 (Bumatay, J., dissenting). "The Constitution shields churches, synagogues, and mosques not because of their magnificent architecture or superlative acoustics, but because they are a sanctuary for religious observers to practice their faith." *Id*.

[6] For example, Michigan provided a blanket exemption from its gathering order for all constitutionally protected conduct. *See, e.g.*, Michigan Gatherings and Face Mask Order ¶ 10.g (Dec. 18, 2020), https://tinyurl.com/d3vp2wmk ("Nothing in this order should be taken to infringe … protections guaranteed by the state or federal constitution under these emergency circumstances."). In recent days, moreover, many states have lifted all restrictions, including capacity limitations and mask requirements.

The idea that religious practice is worthy of protection no matter where it happens is deeply embedded in this nation's history and traditions. As James Madison observed, "[t]he religion [] of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as [he] may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in *Selected Writings of James Madison* 21, 22 (Ralph Ketcham ed., 2006). Indeed, the Founders encouraged explicit protection for religious freedom in the Bill of Rights because in "[t]he new plan," there was "no declaration[] that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own conscience and understanding." *Letters of Centinel II*, reprinted in 2 *The Complete Anti-Federalist* 143, 152 (Herbert J. Storing ed., 1981); 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.").

Beyond history and tradition, this Court has declared that the "Free Exercise Clause[] requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). This is because to afford special treatment only to conventionally defined "church[es]" while denying it to religious activities "which are organized for a religious purpose and have sincerely held religious tenets," but are not conventional

"houses of worship," would be to discriminate on the basis of religion. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 728 (9th Cir. 2011) (O'Scannlain, J., concurring). As this Court recognized in striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in constituency," the Free Exercise clause prohibits the government from "mak[ing] explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). Equally clear is this Court's aversion to governments or courts sifting through personal beliefs and practices to determine whether they're sufficiently religious under the Free Exercise Clause. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established, in numerous other contexts, that *courts* should refrain from trolling through a person's … religious beliefs.") (emphasis added); *see also Capitol Hill Baptist Church v. Bowser*, 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020) ("It is for the Church, not the District or this Court, to define for itself the meaning of 'not forsaking the assembling of ourselves together.'") (quoting Hebrews 10:25)).

Here, neither Wong nor Busch, nor millions of other Christians, view the "church [as] a building" only. *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, 959 F.3d 669, 670–71 (5th Cir. 2020) (Willett, J., concurring) ("When the New Testament speaks of the church, it never refers to brick-and-mortar places where people gather, but to flesh-and-blood people who gather together. Think people, not steeple."); *see also Engel v. Vitale*, 370 U.S. 421, 442 n.7 (1962) (Douglas, J. concurring) ("The First Amendment put an end to placing any one

church in a preferred position."); *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 175 (1844) ("Different sects have different forms of worship, but all agree that preaching is indispensable."). Instead, in-home "[c]ommunal worship, congregational study, and collective prayer are central tenants of [their] faith and ministry." App. 197 ¶5; App. 201 ¶5. The panel majority thus erred in limiting this Court's recent precedents to "Houses of Worship." This Court should correct that error.

II. The Equities Weigh Strongly In Favor Of Injunctive Relief

A. The State's Violation Of Applicants' Constitutional Rights Will Continue To Cause Irreparable Harm Absent Injunctive Relief.

"There can be no question that the challenged restrictions, if enforced, will cause irreparable harm," because it is well-settled that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, as the district court correctly found, Wong and Busch established irreparable harm based on the State's deprivation of religious freedoms. App. 127–28; *see also South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1149 (9th Cir. 2021) ("We agree that South Bay is suffering irreparable harm by not being able to hold worship services in the Pentecostal model to which it subscribes."). The Ninth Circuit did not disturb that ruling even though it erroneously held that the Gatherings Guidance does not violate the First Amendment. Judge Bumatay, who correctly held that Wong and Busch had demonstrated a likelihood of success and thus addressed the equities, concluded that "[t]he irreparable harm

factor also cuts strongly in favor of granting the injunction" because, "[a]s enforced, the household limitation bars Wong and Busch from hosting in-home Bible studies or communal prayers with their group of fellow worshipers." App. 49 (Bumatay, J., dissenting). The Gatherings Guidance—like the Blueprint itself—has no termination date and will continue to apply even when Santa Clara County transitions to Tier 4. Accordingly, "absent injunctive relief, [Wong and Busch's] religious practices will continue to be interrupted for the foreseeable future." App. 50 (Bumatay, J., dissenting).

B. The Balance Of Hardships And Public Interest Likewise Favor 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 State argued below that an injunction is not in the public interest because it could cause "the State's hospital system" to be "overwhelmed." But there are now roughly *one tenth* as

many patients hospitalized with COVID-19 in California as there were during the high point of the winter surge in early January, and the numbers continue to trend downward.[7] Although it is *possible* that the hospital system will be threatened someday in the future, the State cannot justify endless restrictions based on such illusory threats. *See South Bay II*, 141 S. Ct. at 720 (statement of Gorsuch, J.) ("[I]t is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could.").

The State engaged in similar fearmongering in *South Bay II*, claiming that "the relief plaintiffs seek from this Court would imperil public health." *See* State Br., Nos. 20A136, 20A137 at 56 (Jan. 29, 2021). But in the nearly two months since this Court enjoined the State's total prohibition on indoor worship, cases, hospitalizations, and deaths have all sharply decreased.[8] For example, on February 5—the day of this Court's *South Bay II* decision—the 7-day rolling average of positive cases per 100,000 was 26.1.[9] By March 30, the 7-day rolling average per 100,000 had dropped below 5.[10] Given the State's dismal track record in predicting the course of the disease, this Court can safely ignore any protestations that an injunction would jeopardize public health.

---

[7] On January 6, 2021, the State reported that there were 22,853 hospitalized patients with COVID-19. CDPH, *Tracking COVID-19 in California*, https://covid19.ca.gov/state-dashboard/. By March 31, 2021, the number of hospitalized COVID-19 patients had dropped to 2,583. *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

The State's justification for continued intrusions on religious liberty is further undermined by the widespread distribution of vaccines in the State to the most vulnerable—the elderly, health care workers, and those with preexisting conditions. Although the overall infection fatality rate (IFR) from COVID-19 has been calculated around .27%, for those under age 70 the IFR is only .05%, while for those above 70 the IFR is 5.4%.[11] In other words, the public health risks of COVID-19 are heavily concentrated in the older population. In defending society-wide lockdowns, the State has argued—and the district court agreed—that the only way to protect the most vulnerable is to reduce the overall spread of the virus in the community. *See* App. 96 (holding that it was rational "to place restrictions on the entire population because vulnerable people have extensive contact with non-vulnerable individuals in long-term care facilities, multigenerational homes, and essential workplaces"). But even if that was true in 2020 (which it was not[12]) any justification for such sweeping lockdowns ended with the arrival of a vaccine.[13] As ample data has confirmed,

---

[11] 5-ER-946–47; *see also* Centers for Disease Control and Prevention, *COVID-19 Pandemic Planning Scenarios*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html. The IFR is effectively zero for those under 20, for those ages 20-49 the IFR it is .02%, and for those between 50 and 70 it is .05%.

[12] Applicants' expert, Dr. Jayanta Bhattacharya, has cogently explained that a system of "focused protection" could be used to prevent the disease from infecting those most vulnerable to sickness and death while allowing the rest of the community to go about their lives with reasonable precautions. 2-ER-136–38 ¶¶ 42–45. Focused protection makes even more sense now that we have a vaccine that can help protect the vulnerable and hasten us toward herd immunity.

[13] Governor Newsom has now made the vaccine available to everyone over 50, and 20.7% of Californians are now fully vaccinated and another 17.3% are partially vaccinated. *See* Vaccines, Cal. Dep't of Public Health, https://covid19.ca.gov/vaccines/#California-vaccines-dashboard.

COVID-19 poses a serious health risk to only a small sector of the population. That sector has been, or soon will be, vaccinated.

The State also argued below that the threat of "new variants" support perpetual restrictions. But there is no evidence that any of the new variants are more dangerous than the previous ones, and the mere possibility of unknown health threats in the future cannot justify indefinite restrictions on liberty. As members of this Court have recognized, "[g]overnment actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner." *South Bay II*, 141 S. Ct. at 720 (Statement of Gorsuch, J.). It is time for California to turn the corner and cease its relentless persecution of the faithful.

III. In The Alternative, The Court Should Grant Certiorari Before Judgment

In the alternative to entering an injunction pending appeal, the Court should grant certiorari before judgment in the Court of Appeals and enjoin the Governor's actions pending disposition by this Court. *See* 28 U.S.C. § 2101(e).

CONCLUSION

This Court undoubtedly has better things to do than sheepdog California and the Ninth Circuit. Yet until State leaders and lower court judges respect the boundaries established by the Constitution, the task of protecting religious believers from overzealous government officials remains this Court's cross to bear. For the reasons set forth above, Applicants respectfully ask this Court to grant the

Application, or grant certiorari before judgment, and enjoin Respondents from continuing their unconstitutional restrictions on religious liberty.

Respectfully submitted,

/s/Ryan J. Walsh

ROBERT E. DUNN
J.D. TRIPOLI
EIMER STAHL LLP
99 S. Almaden Blvd.
Suite 642
San Jose, CA 95113
(408) 889-1690
rdunn@eimerstahl.com
jtripoli@eimerstahl.com

JOHN ADAMS
EMILY E. SULLIVAN
EIMER STAHL LLP
224 S. Michigan Ave.
Suite 1100
Chicago, IL 60604
(312) 660-7600
jadams@eimerstahl.com
esullivan@eimerstahl.com

RYAN J. WALSH
Counsel of Record
AMY MILLER
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 442-5798
rwalsh@eimerstahl.com
amiller@eimerstahl.com

Counsel for Applicants

No. _____

In the Supreme Court of the United States

RITESH TANDON; KAREN BUSCH; TERRY GANNON; CAROLYN GANNON; JEREMY WONG; JULIE EVARKIOU; DHRUV KHANNA; CONNIE RICHARDS; FRANCES BEAUDET; MAYA MANSOUR,

APPLICANTS,

v.

GAVIN NEWSOM; ROB BONTA; TOMÁS J. ARAGÓN; JEFFREY V. SMITH; SARA H. CODY.

RESPONDENTS.

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Ninth Circuit

APPENDIX TO
EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR IN THE ALTERNATIVE FOR CERTIORARI BEFORE JUDGMENT OR SUMMARY REVERSAL

RELIEF REQUESTED BY SATURDAY, APRIL 3, 2021

ROBERT E. DUNN
J.D. TRIPOLI
EIMER STAHL LLP
99 S. Almaden Blvd.
Suite 642
San Jose, CA 95113
(408) 889-1690
rdunn@eimerstahl.com

JOHN K. ADAMS
EMILY E. SULLIVAN
EIMER STAHL LLP
224 S. Michigan Ave.
Suite 1100
Chicago, IL 60604
(312) 660-7600
jadams@eimerstahl.com
esullivan@eimerstahl.com

RYAN J. WALSH
Counsel of Record
AMY MILLER
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 442-5798
rwalsh@eimerstahl.com
amiller@eimerstahl.com
jtripoli@eimerstahl.com

Counsel for Applicants

TABLE OF CONTENTS

FOR PUBLICATION

FILED

MAR 30 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RITESH TANDON; KAREN BUSCH; TERRY GANNON; CAROLYN GANNON; JEREMY WONG; JULIE EVARKIOU; DHRUV KHANNA; CONNIE RICHARDS; FRANCES BEAUDET; MAYA MANSOUR, Plaintiffs-Appellants, v. GAVIN NEWSOM; XAVIER BECERRA; SANDRA SHEWRY; ERICA PAN; JEFFREY V. SMITH; SARA H. CODY, Defendants-Appellees.	No. 21-15228 D.C. No. 5:20-cv-07108-LHK Northern District of California, San Jose ORDER

Before: M. SMITH, BADE, and BUMATAY, Circuit Judges.

Order by Judges M. SMITH and BADE, Partial Dissent and Partial Concurrence by Judge BUMATAY

This appeal challenges the district court's February 5, 2021 order denying Appellants' motion for a preliminary injunction. Appellants now move for an emergency injunction pending appeal, seeking to prohibit the enforcement of California's restrictions on private "gatherings" and various limitations on businesses as applied to Appellants' in-home Bible studies, political activities, and business operations. We conclude that the Appellants have not satisfied the

requirements for the extraordinary remedy of an injunction pending appeal. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Therefore, we deny the emergency motion.

I.

A.

In the district court, Appellants challenged the State's and Santa Clara County's restrictions on private "gatherings." However, in this motion, Appellants limit their challenges to the State's restrictions.[1] These restrictions "appl[y] to private gatherings, and all other gatherings not covered by existing sector guidance are prohibited." Cal. Dep't of Pub. Health, *Guidance for the Prevention of COVID-19 Transmission for Gatherings*, https://cdph.ca.gov/programs/cid/dcdc/pages/covid-19/guidance-for-the-prevention-of-covid-19-transmission-for-gatherings-november-2020.aspx (last visited Mar. 30, 2021). "Gatherings are defined as social situations that bring

[1] The State restrictions assign counties to different tiers based on factors such as adjusted COVID-19 case rates, positivity rates, a health equity metric, and vaccination rates. *See* Cal. Dep't of Pub. Health, *Blueprint for a Safer Economy*, https://covid19.ca.gov/safer-economy/#tier-assignments (last visited Mar. 30, 2021). These tiers are assigned number and color designations in descending order of risk: Widespread (Tier 1 or purple); Substantial (Tier 2 or red); Moderate (Tier 3 or orange); and Minimal (Tier 4 or yellow). *See id.* Appellants reside in Santa Clara County, which is currently a Tier 2 county.

together people from different households at the same time in a single space or place." *Id.* Under these restrictions, indoor and outdoor gatherings are limited to three households, but indoor gatherings are prohibited in Tier 1 and "strongly discouraged" in the remaining tiers. *Id.* The gatherings restrictions also limit gatherings in public parks or other outdoor spaces to three households. *Id.* A gathering must be in a space that is "large enough" to allow physical distancing of six feet, should be two hours or less in duration, and attendees must wear face coverings. *Id.* Finally, singing, chanting, shouting, cheering, and similar activities are allowed at outdoor gatherings with restrictions, but singing and chanting are not allowed at indoor gatherings. *Id.*

Appellants assert that the State's gatherings restrictions provide exemptions, which allow outdoor gatherings with social distancing, political protests and rallies, worship services, and cultural events such as weddings and funerals. Therefore, we also consider the restrictions that apply to these events. Under the State's restrictions, outdoor services with social distancing are allowed at houses of worship, such as churches, mosques, temples, and synagogues. *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs (under "Can I Go to Church" tab) (last visited Mar. 30, 2021). Indoor services at houses of worship are subject to capacity restrictions (25% of capacity in Tier 1 and 2 counties, and 50% of capacity in Tier 3 and 4 counties), and other safety modifications

including face coverings, COVID-19 prevention training, social distancing, cleaning and disinfection protocols, and restrictions on singing and chanting. *Id.*; *see also Industry Guidance to Reduce Risk*, https://covid19.ca.gov/industry-guidance#worship (under "Places of worship and cultural ceremonies—updated February 22, 2021" tab) (last visited Mar. 30, 2021).

The restrictions for houses of worship also apply to cultural ceremonies such as funerals and wedding ceremonies. *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under "Are weddings allowed?" tab) (last visited Mar. 30, 2021). However, wedding receptions are subject to the gatherings restrictions, so in Tier 1 receptions must take place outdoors and are limited to three households, while outdoor or indoor receptions, limited to three households, are allowed in the other tiers. *Id.*

"[S]tate public health directives do not prohibit in-person *outdoor* protests and rallies" with social distancing and face coverings. *Id.* (under "Can I engage in political rallies and protest gatherings?" tab) (emphasis in original). The terms "protests" and "rallies" are not defined,[2] but the guidance states that "Local Health Officers are advised to consider appropriate limitations on outdoor attendance capacities," and that failure to follow the social distancing restrictions and to wear

[2] One dictionary defines a "rally" as "a mass meeting intending to arouse group enthusiasm." *See Rally*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rally (last visited Mar. 30, 2021).

face coverings "may result in an order to disperse or other enforcement action." *Id.* Indoor protests and rallies are not allowed in Tier 1 counties but are allowed in other counties subject to the capacity restrictions for places of worship, social distancing, face covering requirements, and prohibitions on singing and chanting. *Id.*

B.

Appellants challenge the restrictions on three grounds. First, Appellants Pastor Jeremy Wong and Karen Busch argue that the gatherings restrictions violate their right to free exercise of religion because they prevent them from holding in-home Bible studies and communal worship with more than three households in attendance. Second, Appellants Ritesh Tandon and Terry and Carolyn Gannon argue that the gatherings restrictions violate their First Amendment rights to freedom of speech and assembly. Tandon was a candidate for the United States Congress in 2020 and plans to run again in 2022, and he claims that the gatherings restrictions prevent him from holding in-person campaign events and fundraisers. The Gannons assert that the restrictions prohibit them from hosting forums on public affairs at their home. Finally, the business owner Appellants argue that the gatherings restriction, capacity limitations, and other regulations on their businesses violate their Fourteenth Amendment substantive due process and equal protection rights.

C.

In determining whether to grant an injunction pending appeal, we apply the

test for preliminary injunctions. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

II.

A.

We first address Appellants' free exercise claim. The district court denied Appellants' motion for a preliminary injunction because it concluded that California's private gatherings restrictions are neutral and generally applicable, and rationally related to a legitimate government interest. *Tandon v. Newsom*, No. 20-CV-07108-LHK, 2021 WL 411375, at *38 (N.D. Cal. Feb. 5, 2021). Alternatively, the district court concluded that the restrictions would satisfy strict scrutiny. *Id.* Appellants argue that the district court erred in applying rational basis review, that the restrictions do not meet the heightened standard of strict scrutiny, and that we should therefore issue an injunction pending appeal.[3]

[3] Appellants do not argue that the State's restrictions on gatherings would fail rational basis review. Under that deferential standard, regulations "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting

Specifically, Appellants assert that the Supreme Court's decisions in *Gateway City Church v. Newsom*, __ S. Ct. __, 2021 WL 753575 (Feb. 26, 2021), *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), establish that the restrictions at issue are not "neutral and generally applicable" and thus strict scrutiny applies.[4] In these cases, the Court addressed free exercise

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)). In contrast, under strict scrutiny, the regulations "must be 'narrowly tailored' to serve a 'compelling' state interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

[4] The parties do not discuss, or even cite, the Supreme Court's recent decisions in *Harvest Rock Church v. Newsom*, ___ S. Ct. ___, No. 20A137, 2021 WL 406257 (Feb. 5, 2021) (per curiam), and *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020) (mem.). In the first of these two decisions in the same case, without elaboration, the Court treated an application for injunctive relief as a petition for writ of certiorari before judgment and granted the petition, vacated the district court's judgment, and remanded to this court to remand to the district court for "further consideration in light of" *Roman Catholic Diocese*. 141 S. Ct. 889.

In the second decision, the Court considered the same prohibitions on indoor services at house of worship that were at issue in *Gateway,* 2021 WL 3086060, at *4, and *South Bay II*, 141 S. Ct. at 716, and granted an application for injunctive relief pending appeal and enjoined the State from enforcing the Tier 1 prohibition on indoor worship services but denied the application with respect to the percentage capacity limitations and the singing and chanting restrictions during indoor services. 2021 WL 406257 at *1. While some Justices noted that they would have granted the application for injunctive relief in full and other Justices noted that they dissented, those Justices only referenced their statements in *South Bay II*. *See id.* Thus, *Harvest Rock* does not substantively add to the body of case law informing our analysis, as our dissenting colleague apparently agrees. *See* Dissent at 7 (noting that "*Roman Catholic Diocese*, *South Bay* [*II*], and *Gateway City Church* instruct us").

challenges to COVID-19-based capacity limitations at public places of worship that were more prohibitive than capacity limitations at comparable businesses. *See Gateway*, __ S. Ct. __, 2021 WL 753575; *South Bay II*, 141 S. Ct. 716; *Roman Catholic Diocese*, 141 S. Ct. 63.

Appellants further argue that the State's current restrictions on in-home or private religious gatherings fail strict scrutiny because they do not apply to "a host of comparable secular activities," such as entering crowded train stations, airports, malls, salons, and retail stores, waiting in long check-out lines, and riding on buses. Thus, Appellants argue that the State's gatherings restriction is underinclusive because it does not "include in its prohibition substantial, comparable secular conduct that would similarly threaten the government's interest." *Stormans, Inc., v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015).

But as we explain below, from our review of these recent Supreme Court decisions, we conclude that Appellants are making the wrong comparison because the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings. When compared to analogous secular in-home private gatherings, the State's restrictions on in-home private religious gatherings are neutral and generally applicable and, thus, subject to rational basis review. *See Church of the Lukumi*

Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 531 (1993) (holding that "a law that is neutral and of general applicability . . . even if the law has the incidental effect of burdening a particular religious practice" must only survive rational basis review). Therefore, we conclude that Appellants have not established a likelihood of success on the merits. *See Winter*, 555 U.S. at 20.

B.

As Appellants argue, three recent Supreme Court decisions addressing free exercise challenges to COVID-19 restrictions are relevant to our analysis. First, in *Roman Catholic Diocese*, the Court held that New York's COVID-19 restrictions triggered strict scrutiny because "[t]he applicants . . . made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." 141 S. Ct. at 66 (quoting *Lukumi*, 508 U.S. at 533). The Court wrote that "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Id.*

As proof of this "especially harsh treatment," the Court pointed out that "while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish," and that those "essential businesses" included "acupuncture facilities, camp grounds, garages, as well as . . . all plants manufacturing chemicals and microelectronics and all transportation facilities." *Id.*; *see also id.* at 69 (Gorsuch, J., concurring) ("People may gather

inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues . . . .”). Because “a large store in Brooklyn . . . could ‘literally have hundreds of people shopping there on any given day,’” but “a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service,” the restrictions were not neutral or generally applicable. *Id.* at 67 (citation omitted). The Court further held that the restrictions did not pass strict scrutiny. *Id.*

Then, in *South Bay II*, the Court reviewed California’s Tier 1 restrictions, which included a total “prohibition on indoor worship services,” and enjoined enforcement of this restriction. 141 S. Ct. at 716. Justice Gorsuch, joined by Justices Thomas and Alito, and with whom Justices Kavanaugh and Barrett agreed,[5] wrote:

> California has openly imposed more stringent regulations on religious institutions than on many businesses. The State’s spreadsheet summarizing its pandemic rules even assigns places of worship their own row. [For the Tier 1 regulations] applicable [at that time] in most of the State, California forbids any kind of indoor worship. Meanwhile, the State allows most retail operations to proceed indoors with 25% occupancy, and other businesses operate at 50% occupancy or more. Apparently, California is the only State in the country that has gone so far to ban *all* indoor religious services.

[5] Justice Barrett did not join Justice Gorsuch’s statement, but she “agree[d] with [that] statement, save” one issue not relevant to this appeal. *South Bay II*, 141 S. Ct. at 717 (Barrett, J., joined by Kavanaugh, J., concurring in the partial grant of application for injunctive relief).

Id. at 717 (Statement of Gorsuch, J.) (citations omitted). Justice Gorsuch also compared indoor religious services to the "scores [that] might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open." *Id.* at 718. And he questioned California's arguments about close physical proximity, even as it allowed certain businesses to permit closer physical interactions. *Id.* at 718–19.

Finally, the Court addressed Santa Clara County's restrictions in *Gateway*, __ S. Ct. __, 2021 WL 753575. Santa Clara County had enacted a restriction that "[p]rohibited" all indoor gatherings. As examples, Santa Clara County listed "political events, weddings, funerals, worship services, movie showings, [and] cardroom operations." But the county imposed different restrictions for "a number of businesses and activity types, including retail stores," which were allowed to operate at 20% capacity indoors. *Gateway City Church v. Newsom*, No. 20-08241, 2021 WL 308606, at *4 (N.D. Cal. Jan. 29, 2021). Our court affirmed the district court's ruling and held that this regulation, which restricted indoor gatherings in "places of worship," "applie[d] equally to all indoor gatherings of any kind or type, whether public or private, religious or secular" because it did "not 'single out houses of worship' for worse treatment than secular activities." *Gateway City Church v. Newsom*, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021) (quoting *Roman Catholic Diocese*, 141 S. Ct. at 66). The Court rejected this reasoning, stating: "The Ninth

Circuit's failure to grant relief was erroneous. This outcome is clearly dictated by [the] Court's decision in" *South Bay II*. *Gateway*, 2021 WL 753575, at *1.

C.

Reviewing this precedent, we conclude that the regulations at issue in *Gateway* and *South Bay II*, which applied total bans on indoor services at houses of worship, differ significantly from those at issue in this case. The gatherings restrictions at issue here do not impose a total ban on all indoor religious services, but instead limit private indoor and outdoor gatherings to three households. There is no indication that the State is applying the restrictions to in-home private religious gatherings any differently than to in-home private secular gatherings.

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. But here, the gatherings restrictions apply equally to private religious and private secular gatherings, and there is no indication, or claim, of animus toward religious gatherings. The restrictions do not list examples of prohibited gatherings or single out religious gatherings. *See Blueprint for a Safer Economy*, https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf (last visited Mar. 30, 2021). Thus, the gatherings restrictions are neutral on their face. *See Lukumi*, 508 U.S. at 533 (holding that for a law that burdens religious practice to be neutral, it must at

least be neutral on its face).

However, "[f]acial neutrality is not determinative." *Id.* at 534.[6] Instead, we must also "survey meticulously the circumstances of governmental categories" to determine whether there are "subtle departures from neutrality" or "religious gerrymander[ing]," which could indicate that the object of the law is to restrict religious practices. *Id.* (citations and internal quotation marks omitted). Here, Appellants have not asserted that the object of the gatherings restrictions is to restrict religious practices, and there is no indication that the restrictions were adopted for discriminatory purposes instead of addressing public health concerns.

Accordingly, we must consider whether the regulations nonetheless "treat[] religious observers unequally," and thus are not laws of general applicability. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020). One way to assess whether a law is selectively applicable is to determine whether the law's restrictions "substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans*, 794

[6] Thus, we agree with our dissenting colleague that "the fact that a restriction is *itself* phrased without reference to religion is not dispositive." Dissent at 6. However, we note that, unlike in *South Bay II*, where California's "spreadsheet summarizing its pandemic rules even assign[ed] places of worship their own row," 141 S. Ct. at 717 (Statement of Gorsuch, J.), the gatherings restrictions here never mention religion. *See also Agudath Israel of Am. v. Cuomo*, 979 F.3d 177, 182 (2d Cir. 2020) (Park, J., dissenting) ("In each zone, the order subjects only 'houses of worship' to special 'capacity limit[s].'").

F.3d at 1079 (citing *Lukumi*, 508 U.S. at 542–46). "In other words, if a law pursues the government's interest 'only against conduct motivated by religious belief' but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Id.* (quoting *Lukumi*, 508 U.S. at 545).

Appellants argue that pursuant to the reasoning of *Roman Catholic Diocese*, *South Bay II*, and *Gateway*, the gatherings restrictions at issue in this case are underinclusive because the State applies different restrictions to commercial activity in public buildings. Appellants compare the restrictions on private gatherings to the restrictions on commercial activities in public buildings, such as train stations, malls, salons, and airports. But in *Roman Catholic Diocese*, *South Bay II*, and *Gateway*, the Court did not make similar comparisons. Instead, in each case in which the Supreme Court compared religious activity to commercial activity, it did so in the context of comparing public-facing houses of worship to public-facing businesses.[7]

[7] The dissent argues that "when California allows greater freedoms for some sectors, it may not leave religious activities behind" and that "the suppression of *some* comparable secular activity in a similar fashion to religious activity is not dispositive." Dissent at 12, 17–18 (citing *Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanagh, J., concurring). Although Justice Kavanaugh's concurrence in *Roman Catholic Diocese* is not the controlling opinion, the dissent mischaracterizes that opinion. Justice Kavanaugh wrote that "under [the Supreme] Court's precedents, it does not suffice for a State to point out that, as compared to *houses of worship*, *some secular businesses* are subject to similarly severe or even more severe restrictions." *Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (some

Because we identify the comparison applied in these cases—houses of worship compared to secular businesses—our dissenting colleague suggests that we are holding that First Amendment free exercise rights apply only in houses of worship. Dissent at 15. He misses the point. We note that in these cases the Supreme Court addressed restrictions on houses of worship—not because we are suggesting that the Constitution's protections for the free exercise of religion apply only in houses of worship—but rather because the Court's precedent directs us to compare restrictions on religious activities to restrictions on "analogous" secular activities. *See Lukumi*, 508 U.S. at 546. In its recent decisions, the Supreme Court held that restrictions subjected worship services to disparate treatment because the settings at issue were similar and subject to meaningful comparisons—houses of worship such as churches, mosques, synagogues, and temples compared to public buildings for commercial activities such as stores, malls, and other businesses.

The dissent's argument that "businesses are analogous comparators to religious practice in the pandemic context," Dissent at 6, oversimplifies the issue here. Although the Supreme Court has compared regulation of religious activities to regulation of business activities under comparable circumstances, it has never framed its analysis in the general terms of "religious practice" and

---

emphasis added). Thus, Justice Kavanaugh, in line with the controlling opinions and orders in *Roman Catholic Diocese*, *South Bay II*, and *Gateway*, compared businesses only to houses of worship, not to all religious activities.

"businesses." Rather, it has focused on the circumstances surrounding the regulated religious activities to determine whether those particular classes of religious activity were being treated less favorably than comparable classes of secular activity. Thus, it was essential in the recent Supreme Court decisions that the regulations in question implicated religious activity *in houses of worship*. *See South Bay*, 141 S. Ct. at 717 (Roberts, C.J., concurring) ("[T]he State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."); *Roman Catholic Diocese*, 141 S. Ct. at 67 (analyzing regulations that "single out houses of worship for especially harsh treatment" and noting that "the maximum attendance at a religious service could be tied to the size of the church or synagogue").

Moreover, when the Court granted injunctive relief as to gathering restrictions in *South Bay* and *Harvest Rock*, it did not issue a blanket injunction covering all state regulation of "religious practice." Instead, it distinguished between restrictions on operating houses of worship—which were impermissible under the circumstances—and capacity limitations and restrictions on "indoor singing and chanting," which it declined to enjoin because the plaintiffs had not carried their burden (at least at that stage of the proceedings) of showing "that the State is not applying the . . . prohibition . . . in a generally applicable manner." *Harvest Rock Church v.*

Newsom, No. 20A137, __ S. Ct. __, 2021 WL 406257, at *1 (Feb. 5, 2021); *South Bay*, 141 S. Ct. at 716 ("This order is without prejudice to the appellants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.").

By taking this approach, we absolutely do not "confine religious freedom to 'free exercise zones,'" Dissent at 15, as the dissent suggests. We simply recognize that the Supreme Court's free exercise analysis—which first requires determining which tier of scrutiny to apply—fundamentally turns on whether a state *discriminates* against religious practice. In turn, to determine whether a state discriminates, the Supreme Court instructs us to compare "*analogous* non-religious conduct," *Lukumi*, 508 U.S. at 546 (emphasis added), not to compare *all* non-religious conduct. *See also Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) (noting that the First "Amendment prohibits government officials from treating religious exercises worse than *comparable* secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." (emphasis added)); *Stormans*, 794 F.3d at 1079 (describing how *Lukumi* requires analyzing "prohibitions on substantial, *comparable* secular conduct that would similarly threaten the government's interest" (emphasis added)).

An analogy requires "[a] corresponding similarity or likeness." *Analogy*,

BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, we cannot answer the question of whether the state discriminates without first framing the correct comparison. And not every activity is analogous to every other activity. That would empty all meaning from the word "analogy." Unsurprisingly, then, this analysis depends on the type, location, and circumstances of the regulated activities.

Here, Appellants' underinclusivity argument relies on a comparison of gatherings in private homes to commercial activity in public buildings, and in particular they point to commercial activity in large buildings such as train stations, airports, and shopping malls.[8] But nothing in the record supports Appellants' suggestions that these commercial activities are proper comparators to in-home private religious gatherings. Instead, it appears Appellants are arguing that we should reach the conclusion the Supreme Court rejected when it did not enjoin capacity limitations and singing restrictions in houses of worship: that any restrictions that have an incidental effect on religious conduct can be appropriately compared to restrictions on any secular conduct.

Based on the record, the district court concluded that the State reasonably distinguishes in-home private gatherings from the commercial activity Appellants

[8] Appellants also mention salons in a laundry list of indoor commercial activities that are not limited to three households. But Appellants do not explain why salons should be considered analogous secular conduct and they point to nothing in the record to support that comparison.

assert is comparable. For example, the district court found that the State reasonably concluded that when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting; that participants in a social gathering are more likely to be involved in prolonged conversations; that private houses are typically smaller and less ventilated than commercial establishments; and that social distancing and mask-wearing are less likely in private settings and enforcement is more difficult. *Tandon*, 2021 WL 411375, at *30. Appellants do not dispute any of these findings. Therefore, we conclude that Appellants have not established that strict scrutiny applies to the gatherings restrictions. Appellants do not contend that the State's restrictions fail rational basis review, and we agree with the district court that the capacity restrictions likely meet that low bar. *See id.* at *40. Therefore, Appellants have not shown a likelihood of success on the merits of the free exercise claim.

D.

Our dissenting colleague apparently agrees with Appellants' argument that broadly compares private religious gatherings to secular or commercial activity, although unlike Appellants he focuses on the comparison to small businesses, such as barbershops and tattoo parlors. These small businesses are not subject to the three-household restriction for private gatherings or the capacity restrictions that apply to other businesses and to houses of worship. *See* Cal. Dep't of Pub. Health,

Blueprint for a Safer Economy, https://covid19.ca.gov/safer-economy/#tier-assignments (last visited Mar. 30, 2021).

Nonetheless, the State requires that these small businesses implement extensive safety protocols, explained in a fourteen-page, single-spaced document, which incorporates the *Guidance on Face Coverings* and therefore "requires the use of face coverings for both members of the public and workers in all public and workplace settings." *See COVID-19 Industry Guidance: Expanded Personal Care Services*, at 3 (Oct. 20, 2020), https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf. Among other things, the *Industry Guidance* also requires that such businesses:

- "Establish a written workplace-specific COVID-19 prevention plan," train workers on that plan and COVID-19 safety in general, and "[r]egularly evaluate the workplace for compliance with the plan."
- "Provide temperature and/or symptom screenings for all workers at the beginning of their shifts."
- "Contact customers before visits to confirm appointments and ask if they or someone in their household is exhibiting any COVID-19 symptoms."
- "Tell customers that no additional friends or family will be permitted in the facility, except for a parent or guardian accompanying a minor."
- "Use hospital grade, Environmental Protection Agency (EPA)-approved products to clean and disinfect anything the client came in contact with."

- "Implement measures to ensure physical distancing of at least six feet between and among workers and customers, except while providing the services that require close contact."

- "Maintain at least six feet of physical distance between each work station area, and/or use impermeable barriers between work stations to protect customers from each other and workers."

- Require that "workers who consistently must be within six feet of customers or co-workers must wear a secondary barrier (e.g., face shield or safety goggles) in addition to a face covering."

- "Stagger appointments to reduce reception congestion and ensure adequate time for proper cleaning and disinfection between each customer visit."

- "Ask customers to wait outside or in their cars . . . [r]eception areas should only have one customer at a time."

Id. at 4–10. These businesses are also subject to ventilation, cleaning, and disinfecting protocols. *Id.* at 7–9. The *Industry Guidance* also provides additional restrictions for specific services such as esthetic and skin care services, electrology services, nail services, massage services, and restrictions for body art professionals, tattoo parlors, and piercing shops. *Id.* at 11–14. These restrictions, for example, "suspend piercing and tattooing services for the mouth/nose area," allow "tattooing or piercing services for only one customer at a time," and state that "[f]acial massages should not be performed if it requires removal of the client's face

covering." *Id.* at 14.[9]

These restrictions for businesses that provide personal care services establish that there is very little basis for comparing these businesses to private in-home religious gatherings. For example, they refer extensively to policies these businesses should adopt regarding "customers," "appointments," and "workers," which do not appear to translate readily to in-home gatherings. Also, ensuring public-facing businesses comply with these regulations is a fundamentally different task from regulating conduct in private homes, which government authorities cannot simply enter at will. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("At the [Fourth] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (quotation marks and citation omitted)). Thus, it appears that "personal care services" are not analogous secular businesses or appropriate comparators to private in-home religious gatherings.

Significantly, we do not ground our conclusion on any speculation outside the

[9] The dissent repeatedly emphasizes tattoo parlors, *see* Dissent at 9, 10, 14, 17, 21, which might provide a useful rhetorical foil for in-home Bible studies, but the parties do not cite tattoo parlors as a point of comparison for in-home religious activities. Our dissenting colleague's implication is that tattoo parlors are subject to less onerous restrictions than in-home Bible study (apparently based on his opinion that a three-household limit is more onerous than the detailed restrictions that apply to businesses that provide personal care services) and that they significantly contribute to the spread of COVID-19 in California (or else they would not be relevant comparators to in-home religious gatherings).

record about the circumstances in which "personal care services" typically take place. The dissent, in contrast, does make such speculations about personal care services. *See* Dissent at 8–10. We remind our colleague, however, that *Appellants* bear the burden of showing a likelihood of success on the merits to justify an injunction pending appeal. To do so on the basis that the regulation fails under strict scrutiny, they (not the State) bear the further burden of showing that the regulation *triggers* strict scrutiny by regulating religious activities more strictly than comparable secular activities. *See Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (explaining that for a preliminary injunction "in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are being threatened with infringement, at which point the burden shifts to the government to justify the restriction." (citation omitted)). They have failed to make that showing here.[10]

E.

Our dissenting colleague also argues that the gatherings restrictions are not neutral because they favor certain political activities, specifically outdoor rallies and

[10] Additionally, our dissenting colleague appears to conflate the two steps of the free exercise analysis when he argues that California's regulation of these businesses "is a sure sign that narrower tailoring is possible for in-home religious practice." Dissent at 18. We need not, and do not, analyze whether California's gatherings restriction is narrowly tailored because we conclude that it does not disfavor religious practice and therefore does not trigger strict scrutiny.

protests, over outdoor religious activities. Dissent at 10–11. However, he recognizes that outdoor religious activities are allowed at houses of worship and are not limited to three households. *See About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs (under "Can I go to church?" tab) (last visited Mar. 30, 2021). Also, indoor rallies and protests are subject to the same restrictions as public indoor religious gatherings at houses of worship. *Id.* (under "Can I engage in political rallies and protest gatherings?" tab) (explicitly applying the restrictions for indoor services at houses of worship to indoor rallies and protests). Therefore, in arguing that outdoor religious and secular activities in private homes are treated differently, it appears that the dissent assumes that outdoor "rallies" and "protests" are allowed in backyards of private homes. Dissent at 10–11. But this is not at all clear from the plain language of the restrictions, which fail to define "rallies" and "protests" and do not clearly delineate where these events are allowed, and so the dissent's argument necessarily depends on assumptions and speculation.

If we were to apply the dictionary definition of "rally," we could conclude that outdoor "rallies" and "protests" refer to mass public gatherings, typically organized outside government buildings, not private gatherings in backyards. *See Rally*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rally (last visited Mar. 30, 2021). Moreover, other language in the restrictions suggests

that rallies and protests are public political events that are treated the same as public religious activities. For example, indoor public religious activities and indoor rallies and protests are subject to the same capacity, face covering, and other safety restrictions. *See About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under "Can I engage in political rallies and protest gatherings?" tab) (last visited Mar. 30, 2021). In addressing rallies and protests, the State encourages "Local Health Officers" to consider outdoor attendance capacities, which appears to refer to capacities in public locations, not backyards. *See id.* The restrictions also state that participants at rallies and protests "must maintain a physical distance of at least 6 feet from any uniformed peace officers." *Id.* While it is perhaps conceivable that uniformed peace officers would be at rallies and protests in private backyards, this restriction certainly suggests the State is addressing outdoor rallies and protests in public locations. Finally, the restrictions encourage those for whom "collective action in physical space is important" to consider participating in protests from their cars. *Id.* (under "I want to express my political views. How can I make my voice heard without raising public health concerns?" tab). Again, this suggests that rallies and protests would occur in public spaces that can accommodate participation from cars, which would seem to exclude the backyards of most private homes.

But again, we need not, and do not, rely on speculation outside the record to

determine whether Appellants have shown that rallies and protests are comparable secular activities. Rather, we decline to grant the "drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), of emergency injunctive relief on the speculative grounds raised by our dissenting colleague because Appellants have failed to carry their burden on these issues. *See Winter*, 555 U.S. at 22 ("[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

Even as we deny Appellants' motion for an injunction pending appeal, we do so without prejudice to the possibility that a plaintiff could conceivably prevail based on the political activities argument that the dissent makes—assuming, of course, that plaintiff could make the necessary factual showings in support of those arguments. But because *these* plaintiffs have not made this argument, and the State has had no reason or opportunity to respond to them, we decline to express an opinion on them now, let alone rely on them to grant the extraordinary remedy of an injunction pending appeal.[11]

* * *

We believe the best interpretation of *Roman Catholic Diocese*, *South Bay II*,

[11] Although our dissenting colleague writes that we "appear[] to share [his] concerns regarding California's exemption for political rallies and protests, but not for religious activity," Dissent at 19, we expressly make no ruling pertaining to the substance of that argument.

and *Gateway* is that rational basis review should apply to the State's gatherings restrictions because in-home secular and religious gatherings are treated the same, and because Appellants' underinclusivity argument fails as they have not provided any support for the conclusion that private gatherings are comparable to commercial activities in public venues in terms of threats to public health or the safety measures that reasonably may be implemented. Thus, Appellants have not shown that gatherings in private homes and public businesses "similarly threaten the government's interest," and therefore they have not shown that strict scrutiny applies.

Even if our dissenting colleague's interpretation of the Supreme Court's precedent is plausible, that is not enough for Appellants to succeed at this stage of the litigation. When a party asks for an emergency injunction pending appeal, we ask whether that party "is *likely* to succeed on the merits." *Winter*, 555 U.S. at 20 (emphasis added). The facts before us and the Supreme Court's current case law do not support the outcome advocated by our dissenting colleague. Thus, it is inappropriate to issue an injunction based on Appellants' free exercise claims at this time.[12]

[12] Because the first *Winter* factor is dispositive of Appellants' emergency motion, we need not address the other factors. *See California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) ("Likelihood of success on the merits is 'the most important' factor; if a movant fails to meet this 'threshold inquiry,' we need not consider the other factors." (citation omitted)).

III.

We also deny as unnecessary Appellants' request for an injunction on their free speech and assembly claims. Tandon seeks to host political activities such as debates, fundraisers, and meet-the-candidate events, while the Gannons wish to hold small-group political discussions. The district court concluded, without explanation, that "the State's private gatherings restrictions do not apply to the political campaign events Tandon wishes to hold." *Tandon*, 2021 WL 411375, at *25. Earlier, in its summary of the various restrictions at issue, the district court stated that "the State permits unlimited attendance at . . . outdoor political events." *Id.* at *15. The district court also stated that Tandon challenged Santa Clara County's restrictions, while the Gannons challenged the State's restrictions. *Id.* at 13. But the district court did not explain why the State's restrictions would apply to the Gannons but not Tandon, and did not explain how, or if, any of these political gatherings would be considered rallies or protests.

On appeal, the State does not challenge the district court's ruling. And Appellants seem to assume that the gatherings restrictions prohibit all political gatherings at issue here, except Tandon's campaign rallies. The parties do not define "rallies," or explain when or where such events are permitted, or whether any restrictions or safety protocols apply to these events. Nonetheless, based on the district court's ruling, the State's gatherings restrictions do not apply to Tandon's

requested political activities, and given the State's failure to define rallies or distinguish Tandon's political activities from the Gannons' political activities, we conclude that, on the record before us, the State's restrictions do not apply to the Gannons' political activities. Therefore, Appellants have not established that an injunction is necessary, and we deny as moot the emergency motion for injunctive relief on these claims.[13]

IV.

Finally, we conclude that the business owner Appellants have not established a likelihood of success on their challenge. We have "never held that the right to pursue work is a fundamental right," and, as such, the district court likely did not err in applying rational basis review to their due process claims. *See Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004); *Tandon*, 2021 WL 411375, at *16–19. Likewise, business owners are not a suspect class, and the district court correctly applied rational basis review to their equal protection claims. *See Williamson v. Lee Optical*, 348 U.S. 483, 489, 491 (1955); *Tandon*, 2021 WL 411375, at *19–25.

V.

Appellants have not demonstrated a likelihood of success on the merits for

[13] This denial is without prejudice to a party asserting in subsequent proceedings that either Tandon's or the Gannons' motion for an injunction is not mooted by the district court's ruling limiting the scope of California's gatherings restriction.

their free exercise, due process, or equal protection claims, nor have they demonstrated that injunctive relief is necessary for their free speech claims. Therefore, we deny the emergency motion for an injunction pending appeal.

DENIED.

FILED

MAR 30 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Ritesh Tandon v. Gavin Newsom, No. 21-15228
BUMATAY, J., Circuit Judge, dissenting in part and concurring in part:

In this uncertain time, only a few things are clear:

First, courts are not competent to respond to the COVID-19 crisis. California, like other States, is charged with the authority and the responsibility of guiding her people through this pandemic. And courts shouldn't engage in unnecessary second-guessing or hindsight quarterbacking when it comes to matters of health and safety.

Second, and most foundational, the Constitution is enduring. The rights enshrined by the Constitution persist in times of crisis and tranquility. Thus, at all times, courts must fulfill their duty to ensure that constitutional rights are protected.

Equally certain are the Supreme Court's instructions for navigating the intersection of these two principles. While States possess the discretion to respond to the pandemic, we can never abdicate our role as the bulwark against constitutional violations. In adjudicating challenges to COVID-19 restrictions, we must recognize that the right to the free exercise of religion guaranteed by the First Amendment is among our most fundamental freedoms. No State, in implementing a COVID-19 response, can arbitrarily discriminate against the exercise of religion.

Three times before, the Supreme Court has found that our court failed to strike the proper balance between these principles. Unfortunately, we make the same mistake here. California currently bans all indoor and outdoor gatherings at home

with more than three households. Pastor Jeremy Wong and Karen Busch seek to enjoin that restriction to allow them to host Bible studies and communal worship in their homes without the three-household limitation. By failing to grant their requested injunction, we disregard the lessons from the Court and turn a blind eye to discrimination against religious practice.

I agree with the majority that (1) an injunction is unnecessary on Appellants' free speech and assembly claims since California's gatherings restrictions do not apply to their political activities, and (2) Appellants have not demonstrated that the State's commercial restrictions violate due process or equal protection. But I would hold that California has clearly infringed on Wong and Busch's free exercise rights. Accordingly, I would grant their requested injunction pending appeal of their religious freedom claim. For this reason, I respectfully dissent.

I.

The Free Exercise Clause forbids the government from subjecting religious activity to "unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (simplified). To that end, a law that burdens religious practice must be both neutral and generally applicable. *Id.* at 546. Otherwise, it must be subjected to "the most rigorous of scrutiny." *Id.* Restrictions are not generally applicable if they burden religious activity more than "analogous" secular conduct. *Id.*

When it comes to Free Exercise challenges to COVID-19 restrictions, we are no longer writing on a blank slate. Just last month, the Supreme Court corrected us in *three* separate cases—each time enjoining portions of California's emergency restrictions on Free Exercise grounds. *See S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay*); *Harvest Rock Church v. Newsom*, No. 20A137, __ S. Ct. __, 2021 WL 406257 (Feb. 5, 2021); *Gateway City Church v. Newsom*, No. 20A138, __ S. Ct. __, 2021 WL 753575 (Feb. 26, 2021). Even before then, the Court provided significant direction on how to evaluate COVID-19 limitations on religious exercise. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). Cumulatively, the message has been clear: States may not disfavor religious activity in responding to the pandemic.

Our first lesson was in *Roman Catholic Diocese of Brooklyn*, when the Court enjoined a New York executive order that limited attendance at religious services to 10 or 25 people, depending on whether the service took place in a "red" or "orange" zone. *Id.* at 65–66. The Court explained that the restriction effected "disparate treatment" because analogous businesses—including acupuncture facilities, campgrounds, garages, and retail stores—were not subject to capacity limits. *Id.* at 66. It therefore applied strict scrutiny and concluded that the order was not narrowly tailored. *Id.* at 67. Justice Kavanaugh further explained that it did not matter that "*some* secular businesses are subject to similarly severe or even more severe

restrictions." *Id.* at 73 (Kavanaugh, J., concurring) (emphasis original). When restrictions create a "favored class" of businesses, the State must justify excluding houses of worship from that class. *Id.*

After *Roman Catholic Diocese* came *Harvest Rock Church*. That case required two interventions by the Supreme Court. On the first trip up to the Court, we had declined to enjoin California's *total* prohibition on indoor worship services in Tier 1—the most severe level of COVID-19 restrictions. *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730–31 (9th Cir. 2020) (*Harvest Rock II*). The Supreme Court gave us a second chance, vacating that order and remanding in light of *Roman Catholic Diocese*. No. 20A94, __ S. Ct. __, 2020 WL 7061630 (Dec. 3, 2020) (*Harvest Rock III*). On the second trip to the Court, we *again* denied relief in a largely unreasoned decision. 985 F.3d 771 (9th Cir. 2021) (*Harvest Rock IV*). The Court once more stepped in and enjoined the prohibition. *Harvest Rock Church*, 2021 WL 406257, at *1.

Our court seemed to take the hint in *South Bay*, which challenged the same ban on indoor religious services as in *Harvest Rock Church*. When the district court denied injunctive relief, we vacated and remanded in light of *Roman Catholic Diocese* and *Harvest Rock Church*. *S. Bay United Pentecostal Church v. Newsom*, 981 F.3d 765 (9th Cir. 2020) (*South Bay II*). But when the district court again denied relief, we simply affirmed, reaching the astounding conclusion that the total ban

satisfied strict scrutiny. *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1146–48 (9th Cir. 2021) (*South Bay III*). This time, the Court responded decisively.

Justice Gorsuch, joined in relevant part by four other members of the Court, explained that California's total ban on indoor religious services "single[d] out religion for worse treatment than many secular activities," triggering strict scrutiny. *South Bay*, 141 S. Ct. at 719 (statement of Gorsuch, J.). And the Court had already "made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution." *Id*. (citing *Roman Catholic Diocese*, 141 S. Ct. 63). Specifically, the State failed to show that less-restrictive alternatives, like those afforded to secular activities, were insufficient to address COVID-19 concerns. *Id.* at 718–19. The Court's order, therefore, "should have been needless" because of the "extensive guidance" made available to lower courts. *Id.* But our failure to apply *Roman Catholic Diocese* compelled the Court itself to enjoin the ban.

Finally came *Gateway City Church*. There, Santa Clara County's order restricted religious activity by shuttering indoor "[g]atherings (e.g., political events, weddings, funerals, worship services, movie showings, cardroom operations)." *Gateway City Church v. Newsom*, No. 20-cv-8241, 2021 WL 308606, at *4 (N.D. Cal. Jan 29, 2021) (*Gateway City Church II*). As here, exceptions were made for certain favored activities but not worship services. *Id* at *10. Nevertheless, we

denied an injunction pending appeal simply because the County's order restricted "gatherings" without specific reference to religion. No. 21-15189, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021) (*Gateway City Church III*). In our view, that made the order neutral and generally applicable. *Id.* The plaintiffs appealed to the Supreme Court, and you can guess the rest: it granted the injunction in a one-paragraph opinion, tersely faulting our court for *again* failing to apply its precedents. *Gateway City Church*, 2021 WL 753575, at *1. Once again, we should have recognized that the Court's prior decisions "clearly dictated" enjoining the restriction. *Id*. At this point, a tale as old as time.

The instructions provided by the Court are clear and, by now, redundant. First, regulations must place religious activities on par with the most favored class of comparable secular activities, or face strict scrutiny. *Roman Catholic Diocese*, 141 S. Ct. at 66–67. States do not satisfy the Free Exercise Clause merely by permitting some secular businesses to languish in disfavored status alongside religious activity. *Id*. Second, the fact that a restriction is *itself* phrased without reference to religion is not dispositive. *See Gateway City Church*, 2021 WL 753575, at *1. So long as some comparable secular activities are less burdened than religious activity, strict scrutiny applies. Third, businesses are analogous comparators to religious practice in the pandemic context. *Roman Catholic Diocese*, 141 S. Ct. at 67.

II.

Pastor Jeremy Wong and Karen Busch each seek an injunction of the California restriction preventing them from hosting Bible studies and communal worship services with more than three total households of fellow worshippers. To succeed, they must establish (1) a strong likelihood of success on the merits, (2) a possibility of irreparable injury if relief is not granted, (3) a balance of hardships in their favor, and (4) advancement of the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Likelihood of success on the merits is the most important preliminary injunction factor. *Doe #1 v. Trump*, 984 F.3d 848, 861 (9th Cir. 2020). Furthermore, because the government is a party to the case, the third and fourth factors merge. *Id.*

A.

Based on the legal background above, California's gatherings restriction as applied to in-home worship and Bible study is subject to strict scrutiny, and the State has not sustained its burden to prove the household limitations are narrowly tailored. Consequently, Wong and Busch have shown a clear likelihood of success on the merits, and the first *Winter* factor tips strongly in favor of granting the injunction.

1.

As *Roman Catholic Diocese, South Bay,* and *Gateway City Church* instruct us, we must apply strict scrutiny to any restriction that disparately impacts religious

practice compared to analogous secular conduct. For purposes of this comparison, "[w]hether conduct is analogous . . . does not depend on whether the religious and secular conduct involve similar forms of activity[,]" but is instead "measured against the *interests* the State offers in support of its restrictions on conduct." *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) (applying *Roman Catholic Diocese* to a regulation on all schools given its impact on religious schools).

Here, the State's worthy interest is in mitigating the transmission of COVID-19. But California's limitations on in-home religious activities is noticeably more restrictive than analogous secular activities. The gatherings order limits Wong's and Busch's Bible study and home worship to three households, even when held outdoors.[1] Yet California permits the operation of many comparable secular activities without similar household limitations, despite implicating the same interest in preventing the spread of COVID-19.

In particular, hair salons, barbershops, and "personal care services" may open indoors without maximum household restrictions.[2] "Personal care services" include

[1] *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings*, California Department of Public Health (Nov. 13, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx.

[2] *See* California Department of Public Health, COVID-19 Industry Guidance: Hair Salons and Barbershops (Oct. 20, 2020),

many businesses where hours-long physical proximity and touching is required, such as nail salons, tattoo parlors, body waxing, facials and other skincare services, and massages.[3] So too with barbershops and hair salons. Discussions of faith and scripture, by comparison, can take place while socially distanced.

Some personal care services may even allow their clients to forego masking. Facials, electrolysis, and other like services necessarily require ready access to a client's face, and California permits clients in such circumstances to go maskless.[4] The result is that a beauty shop may host an *unrestricted* number of households, half of them bare-faced and in immediate proximity to the other half. But Wong, in a space of the same size—even an outdoor space—would be limited to three households, despite donning masks and maintaining a six-foot distance.

Likewise, Busch, whose Bible study is attended by couples, can host only two other couples in her house or backyard, no matter how much distance they maintain or the size of her living room. But tattoo artists may inject ink into the arms, legs,

---

https://files.covid19.ca.gov/pdf/guidance-hair-salons--en.pdf; California Department of Public Health, COVID-19 Industry Guidance: Expanded Personal Care Services (Oct. 20, 2020), https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf.

[3] *See Industry guidance to reduce risk*, Covid.CA.gov, https://covid19.ca.gov/industry-guidance/#personal-care-services (updated Oct. 20, 2020).

[4] California Department of Public Health, COVID-19 Industry Guidance: Expanded Personal Care Services 11 (Oct. 20, 2020), https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf.

and faces of clients with no household limitation—meaning, in a space the same size as Busch's living room, tattoo parlors may accommodate perhaps double or triple the number of households.

The disparity of treatment between secular and religious activities is even more pronounced when we consider the outdoor-gatherings rules. Under California's restrictions, except at places of worship,[5] outdoor gatherings for religious activities are subject to a three-household maximum. Nevertheless, outdoor gatherings for rallies and protests are subject to *no* household maximum, so long as attendees stay six feet away from others of different households.[6] Accordingly, if Wong and Busch move their Bible studies or prayer groups to their backyards, the three-household maximum would still be in effect. But if a political party or organization wants to hold a rally or protest *at the same or any other location*, then maximum household limits are off the table. Under the Constitution, what's good for political rallies and protests should also be good for religious

[5] Although California restricts indoor capacity at places of worship to 25% in Tiers 1 and 2 and to 50% in Tiers 3 and 4, it does not impose maximum household limits on outdoor activities. *See Industry guidance to reduce risk*, Covid.CA.gov, https://covid19.ca.gov/industry-guidance/ (under the "Places of worship and cultural ceremonies" tab) (updated Feb. 22, 2021).

[6] *About COVID-19 restrictions*, Covid19.CA.gov (Mar. 22, 2021), https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under the "Can I engage in political rallies and protest gatherings?" tab).

worship. In other words, California cannot treat religious exercise worse than political expression.

A law is not generally applicable when its restrictions "substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 542–46). But California is guilty of doing just that. The State makes exemptions based on the *subject matter* of the gathering by lifting household caps for political expression but not for religious expression. If people want to gather to engage in an outdoor political rally or protest, California's message to them is, "Go right ahead!" But if those same people wish to gather outdoors to pray, unless at a place of worship, California says, "Not so fast!" Political rallies and protests are favored—even though the State admits that they "present special public health concerns for high risk of COVID-19 transmission."[7] Religious gatherings are not. This sort of religious gerrymander is odious to the First Amendment and to the Supreme Court's precedents. Consequently, California's restrictions have the same problem as in *Gateway City Church*: once again providing exceptions for certain favored activities but excluding religious activities. 2021 WL 308606, at *10.

[7] *About COVID-19 restrictions*, Covid19.CA.gov (Mar. 22, 2021), https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under the "Can I engage in political rallies and protest gatherings?" tab).

These inconsistent regulations amount to disparate treatment of religious practice and are accordingly not generally applicable. *See Roman Catholic Diocese*, 141 S. Ct. at 66–67; *South Bay*, 141 S. Ct. at 717 (statement of Gorsuch, J.). California's COVID-19 restrictions patently favor analogous, secular activities over in-home worship and Bible studies. Thus, these restrictions are subject to the "most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. I do not begrudge business owners their reprieve, but when California allows greater freedoms for some sectors, it may not leave religious activities behind. The Court's recent decisions "clearly dictate[]" the outcome here. *Gateway City Church,* 2021 WL 753575, at *1. Strict scrutiny applies.

2.

To satisfy strict scrutiny, California must show that the restriction is narrowly tailored to serve a compelling state interest. *Roman Catholic Diocese*, 141 S. Ct. at 67. Managing the COVID-19 pandemic is doubtless a compelling interest. *Id.* But California has not met its burden of demonstrating that the gatherings restriction is narrowly tailored.

Our strict scrutiny review is no less exacting because of our unusual times. Even in the face of a pandemic, "[i]t has never been enough for the State to insist on deference or demand that individual rights give way to collective interests." *South Bay*, 141 S. Ct. at 718 (statement of Gorsuch, J.). While "we are not scientists," we

do not "abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty." *Id*.

California asserts the gatherings restriction is narrowly tailored because it is based on "objective risk criteria," and baldly claims that less-restrictive alternatives will not do. *See Tandon v. Newsom*, No. 20-cv-7108, 2021 WL 411375, at *18 (N.D. Cal. Feb. 5, 2021). The criteria are:

> (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing.

Id. But these criteria are nearly word for word the same ones rejected by the Supreme Court as insufficient to justify the shutdown of places of worship under strict scrutiny. *See South Bay III*, 985 F.3d at 1134 (listing criteria); *South Bay*, 141 S. Ct. at 718 (statement of Gorsuch, J.) (noting that these factors—while "legitimate concerns"—do not justify a total ban on places of worship).

The reasoning of *South Bay* applies with equal force to worship and prayer within the home. The above factors are not "always present in [in-home] worship," even with more than three households, and they are not "always absent from the other secular activities its regulations allow." 141 S. Ct. at 718. An in-home Bible

study including more than three households may be conducted with face coverings and physical distancing; for a limited duration; with no "mixing" of households, physical interactions, or singing or shouting; and with open windows and doors. The same can hardly be said of tattoo parlors and nail salons. This sort of mismatch is a "telltale sign[]" of the lack of narrow tailoring. *Id.* California's failure to even attempt to distinguish *South Bay* only underscores this inevitable conclusion.

Even if studying scripture at home risks some level of transmission of COVID-19, the exemptions for barbershops, tattoo and nail parlors, and other personal care businesses reveal that less-restrictive alternatives are available to California to mitigate that concern. If the State is truly concerned about the "proximity, length, and interaction" of private gatherings, as it claims, it could regulate those aspects of religious gatherings in a narrowly tailored way. But the one thing California cannot do is privilege tattoo parlors over Bible studies when loosening household limitations.[8]

[8] The majority falsely charges me with implying that tattoo parlors "significantly contribute" to the spread of COVID-19 in California. Maj. Op. 22 n.9. I make no such implication. Indeed, the majority cites to nothing in my dissent for this needless accusation. I draw the comparison between the two because tattoo parlors require close interactions, while Bible studies do not. That California treats them differently should be given the highest scrutiny.

Accordingly, the gatherings restriction fails strict scrutiny when applied to religious practices, and so Wong and Busch are likely to prevail on their Free Exercise claim.

3.

The majority concludes that Wong and Busch are unlikely to succeed on the merits because California bans in-home gatherings with more than three households across the board. The majority insists that we look to California's treatment of other in-home activities, and not to secular businesses, to determine if the Constitution was violated. It confines *Roman Catholic Diocese*, *South Bay*, and *Gateway City Church* to only places of worship. This is wrong for several reasons.

Neither the Constitution nor the Court's precedents limit the right to free exercise to places of worship. The text of the First Amendment confers protection on religious "exercise," not "places of worship." U.S. Const. amend. I. Thus, the freedom to practice one's religion inheres without respect to location. So whether at church, mosque, synagogue, or *at home*, the State may not infringe on the free exercise right—at least not without a compelling interest and narrow tailoring.

The majority draws a different rule, allowing States to disfavor religious exercise at home, as long as they ensure places of worship maintain equal footing with business interests. But there is no basis under the Free Exercise Clause or the Supreme Court's precedents to confine religious freedom to "free exercise zones,"

while worship elsewhere is left in the cold. The majority only gets there by narrowing *Roman Catholic Diocese*, *South Bay*, and *Gateway City Church*'s applicability to places of worship so that they have no binding or even persuasive value in any other context. But as lower court judges, we "don't have license to adopt a cramped reading of a case" or to "create razor-thin distinctions" to evade the reach of precedent. *Nat'l Lab. Rels. Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Loc. 229, AFL-CIO*, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting). Rather, we often look to the "reasoning" of the Court's precedents for instruction, not just a simplistic comparison of facts. *Langere v. Verizon Wireless Servs. LLC*, 983 F.3d 1115, 1121–22 (9th Cir. 2020).

By limiting these precedents to houses of worship, the majority loses sight of *why* houses of worship are protected at all: because of the religious exercise that occurs therein. The Constitution shields churches, synagogues, and mosques not because of their magnificent architecture or superlative acoustics, but because they are a sanctuary for religious observers to practice their faith. And that religious practice is worthy of protection no matter where it happens. As singer Brandon Flowers puts it, "[t]his church of mine may not be recognized by steeple / But that doesn't mean that I will walk without a God." *Playing With Fire*, Flamingo (Island Records 2010). So while Wong and Busch's prayer groups and Bible studies do not

take place in a building topped with a steeple, the First Amendment is broad enough to shelter their worship.

The majority artificially creates narrow lines of comparison by refusing to consider California's treatment of secular businesses. This flies in the face of the Court's instructions, which analogized places of worship to a broad range of facilities, including schools, garages, and campgrounds. *Roman Catholic Diocese,* 141 S. Ct. at 66. Under California's stated interest in reducing the transmission of COVID-19, it's hard to see why in-home religious gatherings should be treated differently from personal care businesses. Indeed, it does not take a scientist or doctor to understand that hair salons, barbershops, and tattoo parlors can operate in spaces similar in size to a home; that they could host a similar number of households as a Bible study; or that they could service customers for as long as a prayer meeting. The majority does not refute any of this. Instead, it cites to the district court's findings regarding the relative risk of transmission between social gatherings in general and *grocery* and *retail* shopping. *See* Maj. Op. 19 (citing *Tandon*, 2021 WL 411375, at *30). None of this is dispositive for comparison to personal care businesses.

Given the similarities between these activities, we should not myopically focus only on California's treatment of in-home activities to determine whether the State unconstitutionally infringes on religious rights. As explained above, the

suppression of *some* comparable secular activity in a similar fashion as religious activity is not dispositive. *See Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring). That California treats all in-home activities in an equally poor manner does not grant it a pass on strict scrutiny review.

The majority also emphasizes that nail parlors and other small businesses are not analogous to in-home worship because, though exempt from maximum household limitations, they must disinfect surfaces and take other protective measures. Maj. Op. 20–22. This only proves my point: there is no apparent reason why California cannot provide health and safety guidance for in-home worship as it does for businesses.[9] That California believes these measures allow businesses—even those requiring physical proximity and unmasking, like facial providers—to open without a three-household limitation is a sure sign that narrower tailoring is possible for in-home religious practice. While such measures may be intrusive, preventing Wong and Busch from practicing their religion as they see fit is even more intrusive.[10]

---

[9] The majority also makes the most circular of arguments here: that personal care businesses are not proper comparators to in-home religious worship precisely because California imposed different COVID-19 restrictions on the two. Maj. Op. 22. But this roundabout reasoning permits the State to shield itself from strict scrutiny by imposing a regulatory disparity, which instead should trigger strict scrutiny. Courts then become nothing more than rubberstamps for State regulation.

[10] The majority reasons that the Fourth Amendment's core protection of the home somehow supports the banning of religious exercises at that same home. Maj. Op. 22. I disagree with that understanding of the Fourth Amendment.

Finally, the majority appears to share my concerns regarding California's exemption for political rallies and protests but not for religious activity. The majority prefers not to reach that issue because Wong and Busch have not made the precise argument here. Maj. Op. 26. But, as Justice Thurgood Marshall once wrote, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 99 (1991). In addition to the other indicia of disparate treatment, the political rallies and protests exemption demonstrates a clear disfavoring of religious activity. Accordingly, we should have held that Appellants are likely to succeed on the merits.[11]

B.

The irreparable harm factor also cuts strongly in favor of granting the injunction. California's gatherings restriction unquestionably causes "irreparable harm." *Winter*, 555 U.S. at 20. As enforced, the household limitation bars Wong and Busch from hosting in-home Bible studies or communal prayers with their group of fellow worshipers. But even during a pandemic, the "loss of First Amendment

[11] Under our recent precedents, a motions panel's decision is not binding on a later merits panel in the same case. *See, e.g.*, *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 753 (9th Cir. 2020). While I question the wisdom of this precedent, the merits panel in this case is free to revisit the majority's erroneous view of the law.

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

Here, the loss has been far greater than just a day. Although both Wong and Busch regularly held these religious gatherings in the years leading up to the pandemic, California has barred them from meeting as a group for nearly a year. And absent injunctive relief, their religious practices will continue to be interrupted for the foreseeable future.

C.

The public interest also favors an injunction. Protecting religious liberty is "obviously" in the public interest. *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). Indeed, the "Constitution and laws have made the protection of religious liberty fundamental." *Apache Stronghold v. United States*, No. 21-15295, 2021 U.S. App. LEXIS 6562, at *20 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting). Here, Wong and Busch request a very narrow injunction, seeking only to prevent California from prohibiting them from hosting religious gatherings at their homes with more than three households during the pendency of this appeal. They have not requested a State-wide injunction of the gatherings rule. Such a targeted injunction is eminently justified compared to the "profound interest in men and women of faith

worshiping together." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky. 2020).

California asserts, and I agree, that "the public has a powerful interest in curbing COVID-19 to prevent illness and death as well as preventing the State's hospital system from being overwhelmed." Opp'n 29. Nevertheless, there is no indication that "public health would be imperiled if less restrictive measures were imposed." *Roman Catholic Diocese*, 141 S. Ct. at 68. Nothing in the record supports the view that Wong's and Busch's in-home worship is more dangerous for the spread of COVID-19 than the operation of other businesses open for customers without household caps.

At bottom, the public interest is not "served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020). Instead, California has amply demonstrated that such alternatives are available given that hair salons, tattoo parlors, and piercing shops are all operating without strict household limitations.

III.

The purpose of the Constitution was to place certain freedoms beyond the whims of the government. Even in times of crisis, we do not shrink from our duty to safeguard those rights. Freedom of worship is one of those enshrined rights, and

the Supreme Court's instructions have been clear, repeated, and insistent: no COVID-19 restriction can disfavor religious practice. Yet our court today trudges out another denial of relief to those seeking to practice their faith in the face of discriminatory restrictions. I respectfully dissent.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RITESH TANDON, et al.

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 20-CV-07108-LHK

ORDER DENYING MOTION FOR INJUNCTION PENDING APPEAL

Re: Dkt. No. 68

The Court DENIES Plaintiffs' motion for an injunction pending appeal, ECF No. 68.

IT IS SO ORDERED.

Dated: February 19, 2021

Lucy H. Koh

LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RITESH TANDON, et al.

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 20-CV-07108-LHK

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 18

Plaintiffs Ritesh Tandon, Terry and Carolyn Gannon, Jeremy Wong, Karen Busch, Maya Mansour, Dhruv Khanna, Frances Beaudet, Julie Evarkiou, and Connie Richards (collectively, "Plaintiffs") sue Defendants Gavin Newsom, the Governor of California; Xavier Becerra, the Attorney General of California; Sandra Shewry, the Acting State Director of the California Department of Public Health; Erica S. Pan, Acting State Public Health Officer of the California; Jeffrey V. Smith, County Executive of Santa Clara County; and Sara H. Cody, Health Officer and Public Health Director of Santa Clara County (collectively, "Defendants"). Plaintiffs bring five claims challenging Defendants' COVID-19 restrictions: (1) violation of the right to free speech and assembly protected by the First and Fourteenth Amendments; (2) violation of the right to free

exercise and assembly protected by the First and Fourteenth Amendments; (3) violation of the right to earn a living under the Due Process Clause of the Fourteenth Amendment; (4) violation of the Equal Protection Clause of the Fourteenth Amendment; and (5) violation of the prohibition on unconstitutionally vague criminal laws.

Before the Court is Plaintiffs' motion for a preliminary injunction. Plaintiffs argue that they are likely to succeed on the merits of their first four claims, they are likely to face irreparable harm absent an injunction, and the public interest favors an injunction. Having considered the parties' submissions and oral arguments, the relevant law, and the record in this case, the Court DENIES Plaintiffs' motion for a preliminary injunction.

I. BACKGROUND

A. The COVID-19 Pandemic

1. The Emergence and Spread of COVID-19

In December of 2019, the novel coronavirus SARS-CoV-2 emerged in the Chinese city of Wuhan. Watt Decl. Exh. 3. That coronavirus spread rapidly worldwide, causing a disease known as Coronavirus Disease 2019 ("COVID-19"). Watt Decl. Exh. 12. On February 7, 2020, about two months after COVID-19 had first been detected in China, Patricia Dowd, a 57-year-old woman living in Santa Clara County, died of COVID-19, becoming the first known COVID-19 death in the United States. Cody Decl. ¶ 10.

There have been 104 million confirmed cases of COVID-19 and 2.2 million deaths from COVID-19 worldwide as of February 3, 2021. *See WHO Coronavirus Disease (COVID-19) Dashboard*, World Health Organization, *available at* https://covid19.who.int/.[1] In the United

[1] The Court takes judicial notice of the most recently reported numbers of COVID-19 infections and deaths. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts take judicial notice of information found on government agency websites, such as the number of COVID-19

States, as of February 3, 2021, there have been 26 million confirmed cases of COVID-19 and 445,000 deaths; both are the highest numbers of any nation in the world. *See COVID Data Tracker*, Centers for Disease Control and Prevention, *available at* https://covid.cdc.gov/covid-data-tracker/#datatracker-home [hereinafter "*CDC COVID Data Tracker*"]. The United States is projected to face a death toll as high as the number of Americans that were killed in battle in World War II. Rutherford Decl. ¶ 26. Public health experts have stated that the pandemic is the worst in at least one hundred years. *Id*. ¶¶ 26, 42; Cody Decl. ¶ 71.

Since the pandemic began, the United States has experienced three waves of COVID-19. Currently, the country is in its third wave, the worst wave yet by far. Rutherford Decl. ¶ 109. In recent weeks, case counts and deaths have repeatedly shattered records. On January 8, 2021, more than 314,000 confirmed cases were reported in the United States, a record number. *See CDC COVID Data Tracker*.

California ("the State") has been particularly affected by the pandemic. As of February 3, 2021, there have been 3.2 million confirmed cases of COVID-19, the highest number of any state in the country, and more than 41,000 deaths, the second most of any state in the country. *See CDC COVID Data Tracker*; *Tracking COVID-19 in California*, California for All, *available at* https://covid19.ca.gov/state-dashboard/. In Santa Clara County, as of February 3, 2021, there have been 102,836 confirmed COVID-19 cases, and 1,433 people have died from COVID-19. Johns Hopkins University, *COVID-19 Status Report*, *available at* https://bao.arcgis.com/covid-19/jhu/county/06085.html.

---

infections and deaths. *See Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *5–6 (N.D. Cal. Sept. 9, 2008) (citing circuit and district court cases). However, to the extent any facts are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of matters of public record . . . . But a court may not take judicial notice of a fact that is subject to reasonable dispute.") (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

California has been particularly impacted during the current wave of the pandemic, when cases and deaths have repeatedly shattered records. From November 16, 2020 to December 16, 2020, the number of new cases per day jumped from 9,890 to 53,711. *See CDC COVID Data Tracker.* Deaths have spiked as well. Prior to the current wave, the record number of deaths per day was 219 on August 1, 2020. *Id*. However, during the current wave, the record number of deaths per day was 764 on January 22, 2021, or almost four times the previous record. *Id.*

The current wave of the pandemic has also strained hospital capacity. In recent weeks, the State and various counties, including Santa Clara County, had 0 percent remaining ICU capacity. *See About COVID-19 Restrictions*, California For All, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed January 19, 2021); COVID-19 Hospitalizations Dashboard, County of Santa Clara Emergency Operations Center, *available at* https://www.sccgov.org/sites/covid19/Pages/dashboard-hospitals.aspx. As a result of the current wave, Los Angeles County recently released a memorandum directing that patients not be transported if they go into cardiac arrest and cannot be revived in the field. *See EMS Transport of Patients in Traumatic and Nontraumatic Cardiac Arrest*, *available at* http://file.lacounty.gov/SDSInter/dhs/1100458_Directive_6revTransportofTraumaticandNontraumaticCardiacArrest.pdf.

As of February 3, 2021, Santa Clara County, which has a population of 1.9 million, has 5 percent remaining ICU capacity, which corresponds to just 16 ICU beds. COVID-19 Hospitalizations Dashboard, County of Santa Clara Emergency Operations Center, *available at* https://www.sccgov.org/sites/covid19/Pages/dashboard-hospitals.aspx; Cody Decl. ¶ 5.

2. How COVID-19 Spreads

COVID-19 is highly contagious. Lipsitch Decl. ¶ 20. It has a reproduction rate of 2 to 6, meaning that, if uncontrolled, each person with COVID-19 spreads it to between two and six others. *Id.* This reproduction rate causes the number of COVID-19 infections to multiply

exponentially. *Id.* If a virus has a reproduction rate of more than one, the epidemic will grow, and disease and death in the population will increase. Stoto Decl. ¶¶ 10, 12; Watt Decl. ¶ 26.

COVID-19 is transmitted when an individual is exposed to a sufficient dose of the virus to overcome the body's defenses. Watt Decl. ¶ 33. COVID-19 is primarily spread through respiratory droplets from an infected person's nose or mouth. Rutherford Decl. ¶¶ 28–33, Watt Decl. ¶¶ 25–32. Although transmission by contact with an object on which the virus is present is believed to be possible, it is rare. Rutherford Decl. ¶ 31; Watt Decl. ¶ 29.

Instead, individuals are likely to be exposed to a sufficient dose of the virus to be infected when they are in close proximity with an infected person for an extended period of time, which permits viral droplets or particles to move from the infected person to others. Watt Decl. ¶¶ 33, 37–44; Rutherford Decl. ¶ 74. The higher the dose of the virus to which someone is exposed, the more likely they are to become seriously ill. Rutherford Decl. ¶ 34.

COVID-19 can be spread by individuals exhibiting no symptoms. About 40 percent of those who are infected are asymptomatic, but asymptomatic people can still spread the virus. Cody Decl. ¶ 9; Rutherford Decl. ¶ 28; Watt Decl. ¶¶ 30–31; Reingold Decl. ¶ 23. Furthermore, even individuals who develop symptoms are believed to be most contagious the day before they develop symptoms. Watt Decl. ¶ 32.

Because COVID-19 can be spread by individuals who are asymptomatic or presymptomatic, it is difficult to control. Watt Decl. ¶ 32. Many people who are infected are not aware that they are sick, so they do not take the appropriate precautions, such as isolating themselves at home. Rutherford Decl. ¶ 28; Watt Decl. ¶ 32. In addition, people who are healthy are often not able to determine by mere observation whether others they are with are sick. Watt Decl. ¶ 39.

Individuals are likely to be exposed to a sufficient dose of the virus to be infected when they are in close proximity with an infected person for an extended period of time, which permits

viral droplets or particles to move from the infected person to others. Watt Decl. ¶¶ 33, 37–44. Accordingly, gatherings, which bring individuals from different households together for an extended period of time, are particularly risky settings for the transmission of COVID-19. *Id.*; Rutherford Decl. ¶¶ 60, 76–77; Cody Decl. ¶¶ 34–35.

The more time that a non-infected person spends in close proximity to an infected person, the higher the likelihood that viral particles will move from the infected person to the non-infected person. Watt Decl. ¶¶ 33, 37–44. For this reason, the risk of COVID-19 transmission increases with the duration of the gathering. Rutherford Decl. ¶ 78; Watt Decl. ¶ 43.

The higher the number of households that gather together, the higher potential there is for the virus to spread. Watt Decl. ¶ 42; Rutherford Decl. ¶ 77. This is because having a larger gathering increases the number of people who can be infected, and those people can then infect others. Watt Decl. ¶ 42. In addition, having a larger gathering increases the likelihood that a person who is infected with COVID-19 is present. *Id.*; Cody Decl. ¶ 34. Furthermore, the likelihood that an infected person is present is increased further where a gathering takes place in a county in which there is a high prevalence of infection. *Id.*; Rutherford Decl. ¶ 81; Stoto Decl. ¶¶ 10, 18.

Indoor gatherings are particularly dangerous because in an indoor environment with limited ventilation, the virus disperses less easily and can remain in the air for a long period of time, which allows it to accumulate into doses large enough to overcome the immune system. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. One study found that the likelihood of transmitting COVID-19 was 18.7 times greater in a closed environment than in an open environment. Watt Decl. ¶ 44. Accordingly, the CDC advises that activities are safer when they are held in outdoor spaces. Cody Decl. ¶ 31. However, even outdoor gatherings carry a risk that the virus will be transmitted, especially when individuals are in close proximity for an extended period. Rutherford Decl. ¶ 77.

Singing, chanting, shouting, loud talking, and sustained conversations present particularly high risks of infection because they involve vocalization, which increases the number of droplets or particles that emit from an infected individual and the distance those droplets or particles can travel. Rutherford Decl. ¶¶ 29, 79; Reingold Decl. ¶¶ 20–22; Cody Decl. ¶ 35. Although droplets will normally fall to the ground within six feet, droplets can travel double that length, or twelve feet, if a person is singing or speaking loudly. Rutherford Decl. ¶ 29. For these reasons, after a choir rehearsal in Washington attended by 61 people, 32 people were confirmed COVID-19 cases, 20 people were probable COVID-19 cases, 3 people were hospitalized, and 2 people died. Reingold Decl. ¶ 22; Cody Decl. ¶ 36.

Wearing face coverings and maintaining at least six feet of physical distance diminish the risk of infection. Watt Decl. ¶¶ 38, 45–46, 48. However, a significant risk of infection remains, particularly when people get together for extended periods and in environments with limited ventilation, such as indoors. *Id.*; Rutherford Decl. ¶¶ 60, 76–77, 84. Accordingly, wearing a face covering and physical distance are measures that should be taken in addition to, not instead of, refraining from lengthy interactions. Rutherford Decl. ¶ 60; Watt Decl. ¶ 50.

In sum, because the virus spreads when droplets or particles move from an infected person to a non-infected person, gatherings are particularly likely to lead to viral spread. Gatherings are especially likely to lead to the spread of COVID-19 when: (1) the duration of time that the gathering is held increases; (2) the number of people and households gathering increases; (3) the rate of COVID-19 in the community increases; (4) the gathering is held indoors; and (5) the gathering involves vocalization, such as loud speaking or singing. Although wearing a face covering and physical distancing diminish the risk of spreading COVID-19, a significant risk of infection remains, especially when gatherings are held indoors.

Because of the dangers of gatherings, at least 23 of 30 California counties experiencing increases in their COVID-19 cases identified gatherings as a cause of the rise in cases. Watt Decl.

¶ 41. In Sacramento, 71 cases of COVID-19 were linked to a church that held large indoor services and smaller services in private homes. Cody Decl. ¶ 37. In Maine, an indoor wedding attended by 62 people resulted in more than 180 infections, including among people living at a long-term healthcare facility and at a jail. *Id*. Eight people who did not attend the wedding died. *Id*. In Michigan, 187 infections were connected to an indoor bar and restaurant with a live DJ and an open dance floor. *Id*. Of the total cases traced back to the restaurant, 144 were people who had been to the venue, and 43 were family members, friends, and other contacts who had not. *Id*.

When California has put restrictions on gatherings into place, there has been a decrease in cases. *Id*. ¶¶ 62, 93. The County has also seen a decrease in cases when gatherings have been restricted. Cody Decl. ¶ 19. For example, when the County first issued a shelter-in-place order, the case count was doubling every five days. *Id*. By contrast, after the County implemented its order, the case count was doubling every three and a half months. *Id*. The County estimates that its shelter in place orders prevented 80 percent of the infections that would have occurred. *Id*. ¶ 20. One study estimates that without the stay at home orders at the outset of the pandemic, ten times as many people would have become infected with COVID-19. Maldonado Decl. ¶ 15.

3. The Effects of COVID-19

COVID-19 results in a wide range of symptoms, from none at all to severe illness and death. Watt Decl. ¶ 21. COVID-19 can cause pneumonia, respiratory failure, other organ failure, cardiovascular events, strokes, seizures, and death. Rutherford Decl. ¶ 21; Watt Decl. ¶ 22; Reingold Decl. ¶ 14.

The risk of severe illness from COVID-19 increases steadily with age. Watt Decl. ¶ 22; Reingold Decl. ¶ 15.[2] However, many younger people have become seriously ill and died from

[2] The CDC previously stated that those in specific age thresholds were more at risk for severe illness. Watt Decl. ¶ 22. However, the CDC now warns that the risk of severe illness increases steadily as a person ages, and it is not only those over 65 who are most at risk. *Id*.

COVID-19. About twenty percent of those who have died of COVID-19 in the United States have been younger than 65 years old. Lipsitch Decl. ¶ 28. In addition, nearly two thousand people who have died of COVID-19 were younger than 30 years old as of February 3, 2021. *See CDC COVID Data Tracker*.

Indeed, people of any age with underlying conditions and pregnant women are at increased risk of severe illness from COVID-19. *Id*.; Rutherford Decl. ¶ 99. Underlying conditions that increase the risk of serious illness include cancer, chronic kidney disease, chronic obstructive pulmonary disease, heart conditions, immunocompromised state, obesity, severe obesity, pregnancy, sickle cell disease, smoking, and type 2 diabetes mellitus. Reingold Decl. ¶ 15. Underlying conditions that might increase the risk of serious illness include asthma (moderate to severe), cerebrovascular disease, cystic fibrosis, hypertension or high blood pressure, immunocompromised state, neurologic conditions, liver disease, being overweight, pulmonary fibrosis, thalassemia, and type 1 diabetes mellitus. *Id*.

The CDC has found that approximately six in ten Americans have been diagnosed with a subset of the COVID-19 underlying conditions. Specifically, six in ten Americans have been diagnosed with at least one of the following: heart disease, cancer, chronic lung disease, stroke, Alzheimer's disease, diabetes, or chronic kidney disease. Reingold Decl. ¶ 17. Moreover, four in ten Americans have been diagnosed with more than one of these conditions. *Id*. These conditions are more common in communities of color and low-income communities. Lipsitch Decl. ¶ 28.

Approximately 15 percent of COVID-19 patients require hospitalization. Rutherford Decl. ¶ 22. Although a minority of COVID-19 patients require hospitalization, a high number of overall infections results in a high number of hospitalizations. Lipsitch Decl. ¶ 17. As a result of the number of patients who require hospitalization, COVID-19 outbreaks have created a public health crisis of the highest magnitude. Rutherford Decl. ¶ 26; Reingold Decl. ¶ 13. The hospital system is so full that it cannot provide appropriate treatment for people who have COVID-19 or otherwise

treatable conditions. Rutherford Decl. ¶ 26.

Even individuals who are not hospitalized can face serious and long-term effects from COVID-19, including cardiovascular, neurologic, renal, and respiratory damage, psychiatric effects, and loss of limbs from blood clotting. Cody Decl. ¶ 7; Han Decl. ¶ 20; Watt Decl. ¶ 23; Rutherford Decl. ¶¶ 23–25, 97. For example, the National Collegiate Athletic Association found that college football players who had recovered from asymptomatic or mildly symptomatic COVID-19 infections had a high rate of myocarditis, which can lead to cardiac arrest with exertion. Rutherford Decl. ¶ 25. Much remains unknown about the effects of a COVID-19 infection, as it typically takes years for scientists to fully analyze a new virus. Rutherford Decl. ¶ 16; Watt Decl. ¶ 18.

There is currently no cure or generally effective treatment for COVID-19. Rutherford Decl. ¶ 38; Watt Decl. ¶ 24. Patients who have trouble breathing can receive breathing and blood oxygenation assistance. *Id*. However, when it is not possible to administer sufficient oxygen through an external device, patients must be intubated and provided breathing assistance using a ventilator. *Id*. Although the treatments have improved since the beginning of the pandemic, there are still many deaths even with the improved treatments. Rutherford Decl. ¶ 40.

Although the first COVID-19 vaccines were approved on December 11, 2020 and December 18, 2020, access to the vaccines remains limited in most communities to health care workers and older adults. In the meantime, prior to the widespread availability of the vaccine, the strategies recommended by the vast consensus of public health experts include stay at home orders, physical distancing requirements, and limitations on gatherings. Rutherford Decl. ¶ 50; Stoto Decl. ¶ 15; Watt Decl. ¶¶ 51–52; Reingold Decl. ¶ 27; Cody Decl. ¶ 75; Maldonado Decl. ¶¶ 13, 18.

B. The State's and the County's Response to COVID-19

1. The State's Response

Since the start of the pandemic, the State's restrictions have constantly evolved based on the scientific understanding of how COVID-19 spreads, the level of spread of COVID-19 in the State, and the extent to which the State's hospitals and ICUs lacked capacity.

On March 4, 2020, Governor Newsom proclaimed a State of Emergency in California. Haddad Decl. Exh. 6.[3] Two weeks later, as the first wave of COVID-19 was spreading, Governor Newsom issued Executive Order N-33-20, the Stay at Home Order, which required "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." Haddad Decl. Exh. 7.

On April 28, 2020, as the first wave of infections came to an end, Governor Newsom announced a "Resilience Roadmap," which outlined four stages for reopening: (1) safety and preparation; (2) reopening of lower-risk workplaces and other spaces; (3) reopening of higher-risk workplaces and other spaces; and (4) ending the Stay at Home Order. Haddad Decl. Exh. 9.

During the summer of 2020, there was a second, and bigger, wave of COVID-19 infections and deaths. Watt Decl. ¶ 66. On July 13, 2020, the State tightened restrictions, ordering closures of bars, pubs, brewpubs, breweries, restaurants, wineries, tasting rooms, family entertainment centers, movie theaters, zoos, museums, and cardrooms. Haddad Decl. Exh. 10 at 5–6; Watt Decl. ¶¶ 74–75. In counties that had heightened infection rates, the State also ordered the closure of indoor operations of houses of worship, offices for non-critical infrastructure sectors, personal care services, hair salons, barbershops, gyms, fitness centers, and malls. *Id.* at 6. As a result of these restrictions, the infection rate decreased significantly. Watt Decl. ¶ 76.

[3] The parties include the State and the County restrictions at issue in this case as exhibits to their declarations. The Court cites to these restrictions throughout the order by citing to the exhibits.

On August 28, 2020, the Governor announced the Blueprint for a Safer Economy ("the Blueprint"), which is an umbrella designation for the COVID-related restrictions enacted by the State. Haddad Decl., Exh. 11. Some of the Blueprint's restrictions are being challenged by Plaintiffs in this case.

The Blueprint is a framework that prescribes restrictions based on the risk tier of the county. *Id.* Counties are assigned to the widespread tier, the substantial tier, the moderate tier, and the minimal tier. *Id.* Counties are assigned to a tier based on: (1) the average number of cases per 100,000 residents over a seven-day period; (2) the average percentage of COVID tests that come back positive over a seven-day period; and (3) the health equity metric, which looks at case counts and positivity rates in the County's most disadvantaged neighborhoods, as measured by voting participation, tree coverage, and retail density. *Id.*; Watt Decl. ¶ 76; Kurtz Decl. ¶¶ 17, 22–24.

The Blueprint's restrictions differ based on the tier the county is in. In assigning activities to each tier, the State considered eight objective factors, which are associated with the likelihood that a given activity will result in the spread of COVID-19: (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing. Kurtz Decl. ¶ 20.

The Blueprint assigns activities to tiers as follows. Counties in the widespread tier are subject to the most severe restrictions. Haddad Decl. Exh. 12. No indoor gatherings are permitted, and outdoor gatherings are limited to three households maximum. *Id*. Restaurants, wineries, cardrooms, gyms, museums, zoos, movie theaters, and family entertainment centers can operate outdoors only. *Id*. Retail and shopping centers can operate at a maximum of 25 percent capacity.

Id. Houses of worship also can operate outdoors only. In addition, on November 21, 2020, the State added a curfew for counties in the widespread tier, who must stop "non-essential" activities between 10 p.m. and 5 a.m.

In the substantial tier, gatherings are "strongly discouraged" but permitted indoors with up to three households. *Id*. Shopping centers can operate at a maximum of 50 percent capacity. *Id.* Museums and zoos can operate at a maximum of 25 percent capacity. *Id*. Restaurants and movie theaters can operate indoors at a maximum of 25 percent capacity or 100 people, whichever is fewer. *Id*. Gyms can operate at a maximum of 10 percent capacity. *Id.* Houses of worship can operate indoors at a maximum of 25 percent capacity. *Id*.

In the moderate tier, gatherings are "strongly discouraged" but permitted indoors with up to three households. *Id*. Shopping centers can operate, but they must close their common areas and reduce the capacity of their food courts. *Id.* Museums and zoos can operate at a maximum of 50 percent capacity. *Id.* Restaurants and movie theaters can operate indoors at a maximum of 50 percent capacity or 200 people, whichever is fewer. *Id.* Gyms, cardrooms, and wineries can operate at a maximum of 25 percent capacity. *Id*. Houses of worship can operate indoors at a maximum of 50 percent capacity. *Id.*

The Blueprint originally set attendance limits for houses of worship in the substantial tier at either 25 percent capacity or 100 people, whichever is fewer, and for houses of worship in the moderate tier at either 50 percent capacity or 200 people, whichever is fewer. Haddad Decl. Exh. 12. However, the fixed 100 and 200 person attendance limits were enjoined by the Ninth Circuit on January 22, 2021. *See South Bay United Pentecostal Church v. Newsom*, --- F.3d ---, 2021 WL 222814, at *17–*18.[4]

[4] The appellants in *South Bay* have asked the United States Supreme Court for an emergency writ of injunction. *See* Emergency Application for Writ of Injunction Relief Requested before Sunday January 31, 2021, No. 20-746 (U.S. filed Jan. 25, 2021). That application is pending.

In every tier, the Blueprint allows modified operation of critical infrastructure sectors, including healthcare, emergency services, the food and agriculture supply chain, the energy sector, water and wastewater management, transportation, communications and information technology, critical manufacturing, financial services, chemical and hazardous materials, defense, and industrial, commercial, residential, and sheltering facilities and services. *Id*.

On top of the Blueprint, the State's Department of Public Health issued guidance on gatherings on October 9, 2020. Dunn Decl. Exh. 32. The State banned indoor gatherings and limited outdoor gatherings to no more than three households in a two hour period, provided that the venue permitted at least six feet of distance and people wore face coverings. *Id*.; Watt Decl. ¶ 81.

On November 13, 2020, the State updated its ban on gatherings. Dunn Reply Decl. Exh. 4. In the widespread tier, indoor gatherings were banned and outdoor gatherings were limited to no more than three households. *Id.*

Beginning in November, a third, and bigger, wave of COVID-19 infections and deaths started. On December 3, 2020, the State issued a new Regional Stay at Home Order, which created five regions in the State and added additional restrictions if the region's ICU capacity dropped below 15 percent. Dunn Reply Decl. Exh. 7. The Regional Stay at Home Order required "[a]ll individuals living in the Region [to] stay home or at their place of residence except as necessary to conduct activities associated with the operation, maintenance, or usage of critical infrastructure." *Id*. Accordingly, under the Regional Stay at Home Order, all gatherings were banned. *Id*. However, outdoor worship and outdoor political expression were permitted. *Id.*

On December 4, 2020, several Bay Area counties, including Santa Clara County, adopted the Regional Stay at Home Order's restrictions even though the counties had not yet met the criteria set by the State. Dunn Reply Decl. Exh. 8. The restrictions went into effect in Santa Clara County on December 6, 2020 at 10:00 p.m. *Id*. On December 15, 2020, the Bay Area region's ICU

capacity dropped below 15 percent, making the Regional Stay at Home Order mandatory in Santa Clara County. On January 25, 2021, the State ended the Regional Stay at Home Order. ECF No. 61 Exh. 1. However, the State's Blueprint restrictions remain in place.

2. The County's Response

Like the State's restrictions, the County's restrictions have been modified as the scientific understanding of COVID-19 has progressed, as the spread of COVID-19 in the County has changed, and as the County's hospital and ICU capacity has changed.

Following the State's declaration of a State of Emergency, on March 16, 2020, the County issued a shelter-in-place order directing all individuals to stay at their place of residence except to perform limited essential activities. Cody Decl. ¶¶ 11, 13. All businesses, except certain essential businesses, were directed to cease operations, except certain minimum basic operations. *Id.* ¶ 13. All gatherings of any number were prohibited, except with members of an individual's own household. *Id.*

On March 31, 2020, the County issued an updated shelter-in-place order that extended through May 3, 2020. *Id.* ¶ 15. The Order included: (1) mandatory social distancing requirements, (2) additional restrictions on essential businesses requiring them to limit the number of people in the business and disinfect high touch surfaces; and (3) a prohibition on the use of playgrounds, dog parks, and public recreational areas. *Id.* ¶ 17.

On April 29, 2020, the County issued a revised shelter-in-place order that extended most shelter-in-place restrictions through May 31, 2020. *Id.* ¶ 22. Then, on May 18, 2020, the County issued a revised shelter-in-place order that extended most of the restrictions. *Id.* ¶ 23. However, based on the progress the County had made in slowing the spread of COVID-19, this order allowed a limited number of businesses and activities to resume operations with safety precautions in place. *Id.* ¶ 24.

On June 1, 2020, the County amended the May order. Based on the progress the County

and the Bay Area had made in slowing the spread of COVID-19, this amendment allowed additional businesses and activities to resume operations and allowed certain outdoor activities to resume with restrictions. *Id.* ¶ 27.

On July 2, 2020, the County issued a new order. *Id.* ¶ 38. Based on the County's increased capacity to implement widespread testing and contain the virus, the County transitioned from a shelter-in-place order to a longer-term harm reduction model. *Id.* ¶ 39. The order allowed most activity, travel, and business operations to resume with significant limitations to reduce the spread of the virus. *Id.* ¶ 40. Indoor and outdoor gatherings were allowed, but with face covering requirements and attendance limits. *Id.* ¶ 42.

Following the July 2 order, the County issued the three orders being challenged in this case: (1) the Mandatory Directive for Gatherings; (2) the Mandatory Directive for Personal Care Services Businesses; and (3) the Mandatory Directive for Outdoor Dining, Wineries, Bars, and Smoking Lounges ("Mandatory Directive for Outdoor Dining").

On July 8, 2020, after COVID-19 cases in the County rose, the County issued a Mandatory Directive for Gatherings, which prohibited indoor gatherings regardless of size and allowed outdoor gatherings of up to 60 people with face coverings and physical distancing. *Id.* ¶ 43. On July 14, 2020, the County issued three directives:

- an Updated Mandatory Directive for Gatherings, which limited indoor and outdoor gatherings,
- a Mandatory Directive for Personal Care Services Businesses, which prohibited any personal services on the face or neck because the client could not wear a face covering, and
- a Mandatory Directive for Outdoor Dining, which prohibited indoor dining and required restaurants to situate tables such that tables were at least 10 feet apart.

Dunn Decl. Exh. 40, 42, 44.

On September 5, 2020, the County revised the Mandatory Directive for Gatherings by

relaxing some of its restrictions on outdoor gatherings. Cody Decl. ¶ 52. On October 4, 2020, the County revised the Mandatory Directive for Outdoor Dining, Wineries, Bars, and Smoking Lounges by broadening the definition of an outdoor facility to include those that have at least 50 percent of the perimeter open to the outdoors if covered, and 25 percent if uncovered. *Id.* ¶ 53. On October 4, 2020, the County also updated the Personal Care Services Directive, which permitted personal services on the face or neck as long as the provider of the service wore an N95 mask. On October 5, 2020, the County issued a revised risk reduction order, which superseded the July 2 order. *Id*. ¶ 57.

On October 13, 2020, the County modified the Mandatory Directive for Gatherings. Bussey Decl. Exh. B. For gatherings that were permitted by the State, the County limited indoor gatherings to a maximum of 100 people, while outdoor gatherings were limited to a maximum of 200 people as long as they could maintain social distancing. *Id*. On November 16, 2020, the County modified the Mandatory Directive for Gatherings. Bussey Decl. Exh. A. Unlike the October 13, 2020 version of the Mandatory Directive for Gatherings, the November 16, 2020 version prohibited indoor gatherings while maintaining the 200 person limit on outdoor gatherings. *Id.*

On October 13, 2020, the County also modified the Mandatory Directive for Outdoor Dining by broadening the definition of an outdoor facility to include those that were completely uncovered, like a courtyard, and by allowing indoor dining at the limits permitted by the Blueprint. Cody Decl. ¶ 62. On November 17, 2020, the County modified the Mandatory Directive for Outdoor Dining by prohibiting indoor dining and indoor wine tasting. *Id*. ¶ 66.

On December 4, 2020, the County adopted the State's Regional Stay at Home Order even though the County had not yet met the criteria set by the State. Dunn Reply Decl. Exh. 8. On December 15, 2020, the Regional Stay at Home order became mandatory in the County. On January 25, 2021, the State ended the Regional Stay at Home Order. ECF No. 61 Exh. 1.

However, the State's Blueprint restrictions and the County's restrictions remain in place. On January 25, 2021, the County issued a modified Mandatory Directive for Gatherings. ECF No. 61 Exh. 3. Like the November 16, 2020 version of the Mandatory Direction, the current Mandatory Directive for Gatherings prohibits indoor gatherings. *Id*. However, the County continues to permit outdoor gatherings with an attendance limit of 200 people. *Id*.

3. Efforts Targeted at Vulnerable Populations

In addition to these community-wide restrictions, the State and the County have also taken measures that are targeted towards protecting populations that are especially vulnerable to severe illness from COVID-19, including the elderly and residents of long-term care facilities.

In January 2020, about a month after COVID-19 was first detected and before any COVID-19 cases had been detected in the State, the State began issuing guidelines and directives that required long-term care facilities to undertake precautions. Steinecker Decl. ¶ 12. These precautions have included routine testing, screening residents, limiting visitations, enhanced sanitation, and mask wearing requirements. Steinecker Decl. ¶¶ 19–24; Tovmasian Decl. ¶¶ 12–16, 24.[5]

Beginning in March 2020, the State has required licensed residential care facilities for the elderly and adult residential facilities to take measures that prevent the spread of COVID-19, including: (1) screening residents and staff for COVID-19 symptoms every day; (2) excluding employees who display symptoms of COVID-19; (3) cleaning and disinfecting high-touch surfaces; (4) requiring employees and residents to wash their hands upon entering the facility; (5) limiting entry only to individuals who need entry for prevention, containment, and mitigation

[5] The declaration of Lilit Tovmasian addresses the State's policies for licensed residential care facilities for the elderly and adult residential facilities, which are considered non-medical facilities. Tovmasian Decl. ¶ 3. By contrast, the declaration of Heidi Steinecker addresses the State's policies for skilled nursing facilities, which are considered medical facilities. Steinecker Decl. ¶ 10.

measures; (6) requiring staff to wear face coverings at all times and remind residents that they are required to wear face coverings as much as practically possible; and (7) requiring training of staff on prevention and control measures. Tovmasian Decl. ¶¶ 12–16, 24.

The State also requires facilities to engage in testing practices. Tovmasian Decl. ¶¶ 18–21, Steinecker Decl. ¶ 15, 19. Facilities are required to test new residents prior to moving into the facility, current residents who were treated off-site, new staff prior to starting, and current staff after returning from a leave of absence. *Id.* ¶ 18. Facilities with a COVID-19 case must retest all residents and staff every 14 days until no new cases are identified in two sequential rounds of testing. *Id.* ¶ 20. Facilities without a COVID-19 case must conduct surveillance testing of 10 percent of all staff every 14 days and testing of residents who display symptoms or have been exposed to someone who has tested positive. *Id.* ¶ 19. If a resident or staff member tests positive, they are isolated and anyone who may have been exposed to them is quarantined. Tovmasian Decl. ¶ 21.

The County has also taken steps to protect vulnerable populations, including targeted outreach to distribute personal protective equipment, establishment of more testing locations in vulnerable communities, and partnerships with community-based organizations. Garcia Decl. ¶ 14. In addition, the County has taken measures to prevent the spread of COVID-19 inside long-term care facilities, including implementing regular staff and resident testing, providing infection control protocols, and visiting facilities to make recommendations on how best to implement infection control. Han Decl. ¶ 9. The County has also taken steps to prevent the spread of COVID-19 inside jails, including implementing regular testing, providing personal protective equipment, contact tracing, and reducing the jail population. *Id.* ¶ 10. Finally, the County has implemented measures to prevent spread inside homeless shelters by housing homeless individuals in motels and finding permanent housing for formerly homeless residents and making regular testing available. *Id.* ¶ 11.

C. Procedural History

On October 13, 2020, Plaintiffs Ritesh Tandon, Terry and Carolyn Gannon, Jeremy Wong, Karen Busch, Maya Mansour, Dhruv Khanna, Frances Beaudet, Julie Evarkiou, and Connie Richards brought suit against Defendants Gavin Newsom, the Governor of California; Xavier Becerra, the Attorney General of California; Sandra Shewry, the Acting State Director of the California Department of Public Health; Erica S. Pan, Acting State Public Health Officer of the California; Jeffrey V. Smith, County Executive of Santa Clara County; and Sara H. Cody, Health Officer and Public Health Director of Santa Clara County. ECF No. 1.

Plaintiffs' Complaint alleged five claims: (1) violation of the right to free speech and assembly protected by the First and Fourteenth Amendments; (2) violation of the right to free exercise and assembly protected by the First and Fourteenth Amendments; (3) violation of the right to earn a living under the Due Process Clause of the Fourteenth Amendment; (4) violation of the Equal Protection Clause of the Fourteenth Amendment; and (5) violation of the prohibition on unconstitutionally vague criminal laws. ECF No. 1 ¶¶ 122–160. Plaintiffs sought declaratory and injunctive relief. ECF No. 1.

On October 22, 2020, Plaintiffs filed a motion for a preliminary injunction. ECF No. 18 ("Mot."). On November 18, 2020, County Defendants and State Defendants each filed an opposition to Plaintiffs' motion for a preliminary injunction. ECF No. 28 ("County Opp'n"); ECF No. 30 ("State Opp'n").

On November 25, 2020, the United States Supreme Court stayed New York's COVID-related restrictions on houses of worship in *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020). The Court requested that Plaintiffs address the United States Supreme Court's decision in their reply and Defendants address the decision in a supplemental brief. ECF No. 38. On December 7, 2020, Plaintiffs filed a reply. ECF No. 39 ("Reply"). On December 11, 2020, Defendants filed a supplemental brief addressing the United States Supreme Court's decision. ECF No. 40 ("Supp. Brief"). On December 17, 2020, the Court held a hearing on Plaintiffs'

motion for a preliminary injunction. ECF No. 46.

On December 21, 2020, State Defendants filed a statement of recent decision in *Harvest Rock Church v. Newsom*, Case No. 20-cv-06414-JGB (C.D. Cal. Dec. 21, 2020), and in *South Bay United Pentecostal Church v. Newsom*, Case No. 20-cv-00865-BAS (S.D. Cal. Dec. 21, 2020). ECF No. 47. On December 23, 2020, State Defendants filed a statement of recent decision in *Disbar Corporation d/b/a 58 Degrees & Holding Co. v. Newsom*, Case No. 20-cv-02473 (E.D. Cal. Dec. 22, 2020), and in *Mitchell v. Newsom*, Case No. 20-cv-08709 (C.D. Cal. Dec. 23, 2020). ECF No. 53. On December 28, 2020, Plaintiffs filed a statement of recent decision in *Agudath Israel of America v. Cuomo*, Case No. 20-3572 (2d. Cir. Dec. 28, 2020). ECF No. 54. On December 31, 2020, State Defendants filed a statement of recent decision in *Gish v. Newsom*, Case Nos. 20-55455, 20-56324 (9th Cir. Dec. 23, 2020), and *South Bay United Pentecostal Church v. Newsom*, Case No. 20-56358 (9th Cir. Dec. 24, 2020). ECF No. 58. On December 31, 2020, Plaintiffs filed a statement of recent decision in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, No. 20-4300 (6th Cir. Dec. 31, 2020). ECF No. 59. On January 29, 2021, County Defendants filed a statement of recent decision in *South Bay United Pentecostal Church v. Newsom*, No. 20-56358 (9th Cir. Jan. 22, 2021); *Harvest Rock Church v. Newsom*, No. 20-56357 (9th Cir. Jan. 25, 2021); and *Gateway City Church v. Newsom*, No. 20-cv-08241-EJD (N.D. Cal. Jan. 29, 2021).

On January 28, 2021, Plaintiffs filed a motion to supplement the record with, or take judicial notice of, four recent documents: (1) a January 25, 2021 order issued by the State of California, lifting the Regional Stay at Home Order; (2) a January 25, 2021 order issued by the County, confirming that the Regional Stay at Home Order is no longer in effect; (3) a January 25, 2021 revised directive for gatherings issued by the County; and (4) a January 13, 2021 report issued by the World Health Organization, addressing the use of PCR tests. ECF No. 61. On February 1, 2021, Defendants filed a joint opposition in part. ECF No. 63. Defendants did not

object to the Court taking judicial notice of the January 25, 2021 documents, but objected to the Court taking judicial notice of the January 13, 2021 report. *Id*.

The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Public records are proper subjects of judicial notice. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee*, 250 F.3d at 689. The Court GRANTS Plaintiff's motion to take judicial notice of the January 25, 2021 documents because these documents are public records that are proper subjects of judicial notice. However, the Court DENIES Plaintiff's motion to take judicial notice of the January 13, 2021 report because courts are not permitted to take judicial notice of the truth of the contents of a document. *Hadley v. Kellogg Sales Company*, 273 F. Supp. 3d 1052, 1061 (N.D. Cal. 2017). Finally, the Court DENIES Plaintiff's motion to supplement the record because if Plaintiffs are permitted to supplement the record, Defendants would also have to be accorded an equal opportunity to add evidence on additional developments. Because the COVID-19 pandemic is rapidly evolving, the process of submitting additional evidence must end.

II. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As the parties seeking the injunction, Plaintiffs bear the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). "A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'"

Lopez v. Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012).

III. DISCUSSION

Plaintiffs' motion for preliminary injunction requests that this Court enjoin the following State and County restrictions:

Business Plaintiffs

- Maya Mansour ("Mansour"), the owner of a skincare bar, seeks to enjoin the County's Personal Care Services Directive, which requires her to equip her staff with N95 masks, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Dhruv Khanna ("Khanna"), the owner of a winery business, seeks to enjoin the State's Blueprint, which limits outdoor gatherings to three households, and the County's Mandatory Directive for Gatherings, which limits outdoor gatherings not prohibited by the State to 200 people, on the grounds that it violates his rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Frances Beaudet ("Beaudet"), a restaurant owner, seeks to enjoin the County's Mandatory Directive for Outdoor Dining, which prohibits her from seating diners indoors, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Julie Evarkiou ("Evarkiou"), a salon owner, seeks to enjoin the State's Blueprint, which limits the capacity of her salon, prohibits indoor gatherings, and limits outdoor gatherings to three households, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Connie Richards ("Richards"), the former owner of a fitness center, seeks to enjoin the State's Blueprint, which limits the capacity of her fitness center and prohibits its operation indoors, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

Free Speech Plaintiffs

- Ritesh Tandon ("Tandon"), a congressional candidate in 2020 who intends to run in 2022, seeks to enjoin the County's Mandatory Directive for Gatherings, which prohibits him from holding indoor political events with more than 100 people or outdoor political events with more than 200 people, on the grounds that it violates his free speech and assembly rights under the First and Fourteenth Amendments.

- Terry and Carolyn Gannon ("the Gannons"), who hold gatherings at their home to discuss matters of public policy, seek to enjoin the State's Blueprint, which prohibits indoor gatherings and limits outdoor gatherings to three households, on the grounds that it violates their free speech and assembly rights under the First and Fourteenth Amendments.

Free Exercise Plaintiffs

- Pastor Jeremy Wong ("Wong") and Karen Busch ("Busch"), each of whom hold Bible studies, theological discussions, collective prayer, and musical prayer at their homes, seek to enjoin the State's Blueprint, which prohibits indoor gatherings and limits outdoor gatherings to three households, on the grounds that it violates their free exercise and assembly rights under the First and Fourteenth Amendments.

Mot. at ii–iii.

The Court first briefly describes the restrictions at issue. Then, the Court analyzes each preliminary injunction factor in turn: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the party's favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20.[6]

[6] Under Ninth Circuit precedent, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *accord Short v. Brown*, 893 F.3d 671675 (9th Cir. 2018) (holding that these factors are "on a sliding scale"). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the

A. The Restrictions at Issue

Plaintiffs' motion requires the Court to address five restrictions: (1) the State's Blueprint; (2) the State's guidance on gatherings; (3) the County's Mandatory Directive for Gatherings, which applies to certain gatherings not banned by the State; (4) the County's Personal Care Services Directive; and (5) the County's Outdoor Dining Directive. Each of these restrictions has been updated several times, including during the course of this litigation. In the Background section above, *supra* Section I-B, the Court described these updates in detail. Below, the Court briefly highlights the restrictions at issue in the instant motion.

The State's Blueprint, which the California Department of Public Health issued on August 28, 2020, is a framework for the State's COVID-19 related restrictions that prescribes restrictions based on the tier in which the county is located. Haddad Decl. Exh. 12. At the most severe or widespread tier, the Blueprint prohibits indoor private gatherings of individuals outside the immediate household and restricts outdoor private gatherings to three households. *Id*. Similarly, the State's guidance on private gatherings, which the California Department of Health updated on November 13, 2020, prohibits indoor gatherings of individuals outside the immediate household and restricts outdoor private gatherings to three households in the widespread tier. Dunn Reply Decl. Exh. 4 (stating that "[g]atherings that include more than 3 households are prohibited" and "gatherings must be outdoors for counties in the [widespread] tier"). Thus, the Court refers to the Blueprint's restrictions on gatherings at the widespread tier and the State's guidance on gatherings at the widespread tier as "the State's private gatherings restrictions."

Importantly, the State permits unlimited attendance at outdoor worship services, outdoor

---

plaintiff need demonstrate only 'serious questions going to the merits.'" *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *All. for the Wild Rockies*, 632 F.3d at 1135). In this case, the Court concludes that the balance of hardships does not tip sharply in Plaintiffs' favor. *See* Section III-C, *infra* (analyzing the balance of the hardships and the public interest, which merge when the government is a party). Accordingly, the Court does not consider whether Plaintiffs have demonstrated serious questions going to the merits.

political events, and outdoor cultural ceremonies like funerals and weddings. As the Ninth Circuit found in *South Bay*, outdoor worship services are particularly viable in year-round warm climates like California's. *Id.* ("Given the obvious climatic differences between San Diego in the winter and say, New York, the . . . allowance for outdoor services is much more than 'lip service' to the demands of the First Amendment."). The State's Blueprint also allows indoor worship services in the substantial, moderate, and minimal tiers. Specifically, at the substantial tier, the State allows indoor services at 25 percent capacity. *South Bay*, 2021 WL 222814, at *17–*18. At the moderate and minimal tiers, the State allows indoor services at 50 percent capacity. *Id.* The County imposes the same limits for the same tiers.

Santa Clara County's Mandatory Directive for Gatherings prohibits all indoor gatherings of individuals outside the immediate household when the County is in the Blueprint's widespread tier. Bussey Decl. Exh. A. However, the County's Mandatory Directive for Gatherings limits outdoor worship services, outdoor political events, and outdoor cultural ceremonies like funerals and weddings to 200 people regardless of the County's Blueprint tier. Bussey Decl. Exh. A, Exh. G (stating that "[o]utdoor gatherings may not exceed 200 people under any circumstances"). In addition, the County "requires that . . . gatherings take place in an area large enough to allow for social distancing of all attendees." Cody Decl. ¶ 61. Thus, the County's Mandatory Directive for Gatherings applies to gatherings not regulated by the State's private gatherings restrictions.[7] The

[7] When Plaintiffs filed the instant motion, Plaintiffs challenged the County's 100 person limit on indoor gatherings and 200 person limit on outdoor gatherings. Mot. at ii. However, on November 16, 2020, before Defendants filed their opposition to the instant motion, the County released an updated Mandatory Directive for Gatherings that prohibited indoor gatherings when the County is in the widespread tier, but did not change the 200 person limit on outdoor gatherings. Bussey Decl. Exh. A (stating that "all indoor gatherings are currently prohibited"); Exh. G (stating that "[o]utdoor gatherings may not exceed 200 people under any circumstances"). Regardless of whether Plaintiffs challenge the County's 100 person limit or the County's prohibition on indoor gatherings in the widespread tier, the Court's analysis is the same.

Court refers to the County's Mandatory Directive for Gatherings as "the County's private gatherings restrictions."

The County's Personal Care Services Directive applies to services that "involve close, often physical contact between service providers and clients." Bussey Decl. Exh. H. The Personal Care Services Directive requires workers to wear N95 masks when "the client cannot wear a face covering." *Id*. The County's Mandatory Directive for Outdoor Dining prohibits indoor dining and requires that outdoor tables be spaced at least ten feet apart. Bussey Decl. Exh. I.

Finally, the Court notes that Plaintiffs' free exercise claims do not challenge restrictions on houses of worship. *See* Tr. of Dec. 17, 2020 Hearing at 21:15–19, ECF No. 60 (The Court: "Are any of these plaintiffs houses of worship, or alleging restrictions on houses of worship? It seems like it's more focused on private gatherings that have religious purposes, like Bible studies in the home." Plaintiffs' Counsel: "I think that's right, Your Honor."). Instead, Plaintiffs challenge restrictions on private gatherings inside and outside their homes. Specifically, Plaintiffs Jeremy Wong and Karen Busch seek to enjoin the restrictions insofar as they (1) ban indoor religious gatherings at their homes, including Bible studies, theological discussions, collective prayer, and musical prayer; and (2) limit outdoor religious gatherings at their homes to three households." Mot. at iii (emphasis added). Thus, the instant motion is distinct from other lawsuits that have challenged restrictions on attendance at houses of worship. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (enjoining 10- to 25-person cap on services at houses of worship); *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814, at *17–*18 (9th Cir. Jan. 22, 2021) (enjoining 100- to 200-person cap on same); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1231 (9th Cir. 2020) (enjoining 50-person cap on same); *Harvest Rock Church, Inc. v. Newsom*, No. 20-56357, 2021 WL 235640, at *2–*3 (9th Cir. Jan. 25, 2021) (O'Scannlain, J., specially concurring) (collecting cases).

B. Plaintiffs are not likely to succeed on the merits of their claims.

Plaintiffs move for a preliminary injunction on four of their five claims: (1) violation of the Fourteenth Amendment's substantive due process right to earn a living; (2) violation of the Fourteenth Amendment's Equal Protection Clause; (3) violation of the First Amendment's right to free speech and assembly; and (4) violation of the First Amendment's right to free exercise and assembly. The Court discusses Plaintiffs' likelihood of success on the merits of each of these claims.

1. Plaintiffs are not likely to succeed on the merits of their Due Process claims.

Plaintiffs Mansour, Khanna, Beaudet, Evarkiou, and Richards are business owners who argue that the State's and County's COVID-related restrictions on their businesses violate their rights to make a living under the Due Process Clause of the Fourteenth Amendment. Specifically, Mansour, who runs a facial bar, challenges the County's Personal Care Services Directive. Mot. at ii. Khanna, who owns a winery, challenges the State's and the County's private gatherings restrictions. *Id*. Beaudet, who owns a restaurant, challenges the County's Mandatory Directive for Outdoor Dining. *Id.* Evarkiou, the owner of a hair salon, challenges the State's private gatherings restrictions and the Blueprint's restrictions on hair salons. *Id*. Richards, a former gym owner, challenges the Blueprint's restrictions on gyms. *Id.*

Plaintiffs contend that the State's and County's COVID-related restrictions on their businesses violate their right to earn a living, as protected by the substantive component of the Due Process Clause. Mot. at 21. "The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that . . . interferes with rights implicit in the concept of ordered liberty." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007) (quotation omitted).

However, as Plaintiffs concede, the right to earn a living is not a fundamental liberty interest that has been traditionally protected by the substantive component of the Due Process Clause. As the Ninth Circuit has explained, "[s]ubstantive due process has . . . been largely

confined to protecting fundamental liberty interests such as marriage, procreation, contraception, family relationships, child rearing, education and a person's bodily integrity, which are 'deeply rooted in this Nation's history and tradition.'" *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). Neither the United States Supreme Court nor the Ninth Circuit "has []ever held that the right to pursue work is a fundamental right." *Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004). Rather, the Ninth Circuit has held that the right to pursue one's profession is not a fundamental right protected by the Due Process Clause. *See Franceschi*, 887 F.3d at 937.

Because no fundamental right is at issue here, judicial review is "narrow." *Sagana*, 384 F.3d at 743. The Court "do[es] not require that the government's action actually advance its stated purposes, but merely look[s] to see whether the government *could* have had a legitimate reason for acting as it did." *Id.* (quoting *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994) (emphasis in original)).

When a state exercises its police powers to enact emergency health measures, courts will uphold them unless (1) the measures have no real or substantial relation to public health, or (2) the measures are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 37 (1905).

Plaintiffs contend that *Jacobson* does not apply to this case for two reasons. First, Plaintiffs argue that *Jacobson* does not apply because the public health emergency has lasted for several months. Mot. at 16–17. However, Plaintiffs have not cited a single case that states that *Jacobson* does not apply if a public health emergency lasts for several months. Indeed, many courts have applied *Jacobson* to COVID-related restrictions despite the length of the pandemic. *See, e.g.*, *Big Tyme Investments, LLC v. Edwards*, --- F.3d ---, 2021 WL 118628, at *6 (5th Cir. 2021) (January 13, 2021 opinion, rejecting the plaintiffs' argument that the district court erred in applying *Jacobson*); *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) ("[T]he district

court appropriately looked to *Jacobson* for guidance, and so do we."); *Delaney v. Baker*, --- F. Supp. 3d ---, 2021 WL 42340, at *11 (D. Mass. 2021) (January 6, 2021 opinion applying *Jacobson*). Second, Plaintiffs argue that *Jacobson* does not apply because *Jacobson* arose in the context of substantive due process, whereas this case raises First Amendment claims as well. Mot. at 17. However, the Court only applies *Jacobson* in the context of Plaintiffs' substantive due process claim. Therefore, the Court continues with its *Jacobson* analysis.

As United States Supreme Court Chief Justice Roberts wrote last year, "[w]hen [public] officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id*. (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

Every court to have addressed the issue of whether COVID-related restrictions violated substantive due process rights has concluded that the plaintiffs were not likely to succeed on the merits of their substantive due process claims. *See Slidewaters LLC v. Washington Dep't of Labor & Industries*, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020) (concluding that water park was not likely to succeed on the merits of its substantive due process claims); *Best Supplement Guide, LLC v. Newsom*, 2020 WL 2615022, at *6 (E.D. Cal. May 22, 2020) (concluding that gym owners were not likely to succeed on the merits of substantive due process claims); *Open Our Oregon v. Brown*, 2020 WL 2542861, at *2 (D. Ore. May 19, 2020) (collecting cases and explaining that businesses' motion for a preliminary injunction should be denied because "[a]t this stage, this Court is inclined to side with the chorus of other federal courts in pointing to *Jacobson* [*v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905)] and rejecting similar constitutional claims brought by Plaintiffs challenging similar COVID-19 restrictions in other states"). Plaintiffs

do not cite a single case holding otherwise.

The Court comes to the same conclusion as the other courts. Below, the Court analyzes the two elements that the United States Supreme Court set forth in *Jacobson*: (1) whether the measures bear a real or substantial relation to public health, and (2) whether the measures are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." *Jacobson*, 197 U.S. at 30.

a. The State's and the County's restrictions bear a real and substantial relation to public health.

As to the first *Jacobson* element, the restrictions on Defendants' businesses bear a real and substantial relation to public health. Every court has also concluded that COVID-19 related restrictions bear a real and substantial relation to public health, and Plaintiffs do not cite a single case holding otherwise. *See, e.g.*, *Bimber's Delwood, Inc. v. James*, --- F. Supp. 3d ---, 2020 WL 6158612, at *9 –*10 (W.D.N.Y. Oct. 21, 2020) (concluding that the plaintiffs could not show that New York's COVID-19 related restrictions on businesses, including bars and restaurants, did not bear a real or substantial relation to public health); *Altman v. County of Santa Clara*, 464 F. Supp. 3d 1106, 1124 (N.D. Cal. 2020) (explaining that the Court "easily concludes" that a shelter in place order bears a real and substantial relationship to the public health goals of reducing COVID-19 transmission and preserving health care resources).

This Court comes to the same conclusion as the other courts. Specifically, the Court finds that (1) the State's Blueprint; (2) the State's private gatherings restrictions; (3) the County's private gatherings restrictions; (4) the County's Personal Care Services Directive; and (5) the County's Mandatory Directive for Outdoor Dining bear a real and substantial relation to public health. The Court discusses each in turn below. Before doing so, the Court notes that the Background Section I-A-2, *supra*, describes at great length the ways in which COVID-19 is spread. Below the Court just highlights a few examples for each set of restrictions.

First, the State's Blueprint bears a real and substantial relation to public health. In

designing the Blueprint and coming up with restrictions for each tier, the State considered eight objective risk criteria related to the spread of COVID-19: (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing. Kurtz Decl. ¶ 20. Because the State has sorted activities based on the risk that they result in the spread of COVID-19, the State's restrictions bear a real and substantial relation to public health, including the interests of slowing the spread of COVID-19, protecting high-risk individuals.

Second, the State's and the County's private gatherings restrictions bear a real and substantial relation to public health. The State and the County limit gatherings because gatherings bring people from different households together for an extended period of time and thus are a main source of COVID-19 spread. Watt Decl. ¶¶ 33, 37–44. The State and the County impose stricter limits on indoor gatherings because indoor gatherings are much more likely to spread COVID-19 than outdoor gatherings. Haddad Decl. Exh. 12 (prohibiting indoor gatherings but allowing indoor gatherings in the widespread tier); Bussey Decl. Exhs. A, G (prohibiting indoor gatherings but permitting outdoor gatherings of up to 200 people). Furthermore, the State's private gatherings restrictions are more stringent in counties with higher rates of transmission, where gatherings are more likely to include someone who has COVID-19. *See* Haddad Decl. Exh. 12 (State Blueprint, prohibiting indoor gatherings in the widespread tier and permitting indoor gatherings of three households in the substantial tier).

Third, the Personal Care Services Directive bears a substantial relation to slowing the spread of COVID-19 because of the unique dangers that personal care services can play in the

spread of COVID-19. COVID-19 is much more likely to be spread when persons are in close proximity for an extended period of time, such as during the time a personal care service is performed. Watt Decl. ¶¶ 33, 37–44. Furthermore, personal care services often take place inside, where COVID-19 transmission is much more likely to occur. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. In addition, the personal care services implicated do not permit the client to wear a face covering, and face coverings help to avoid the transmission of COVID-19. Watt Decl. ¶¶ 38, 45–46, 48. Thus, it is rational for the County to impose additional restrictions on personal care services, including requiring workers to wear N-95 masks. Dunn Decl. Exh. 42. The County might reasonably require workers to wear more protective masks because clients cannot wear masks at all during the services, which puts workers at a significantly higher risk of contracting COVID-19. *See* Bhatia Reply Decl. ¶ 65 (explaining that workers bear the burden of infection risk in workplace settings).

Fourth, the Mandatory Directive for Outdoor Dining bears a substantial relation to slowing the spread of COVID-19 because of the unique dangers of indoor dining in spreading COVID-19. COVID-19 is much more likely to be spread inside than outside. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Furthermore, COVID-19 is much more likely to be spread when persons are in close proximity for an extended period of time, such as during a meal. Watt Decl. ¶¶ 33, 37–44. In addition, while dining, people cannot wear face coverings, which help to avoid the transmission of COVID-19. *Id*. ¶¶ 38, 45–46, 48. Given these circumstances, the County may legitimately require that dining only take place outdoors and that tables be spaced 10 feet away from each other. Dunn Decl. Exh. 44. Thus, the State's and the County's restrictions at issue bear a real and substantial relation to public health and satisfy the first *Jacobson* element. *Jacobson*, 197 U.S. at 30 (explaining that courts should uphold emergency public health restrictions unless they do not bear a "real or substantial relation" to public health).

b. The State's and County's restrictions are not a plain, palpable invasion of rights secured by fundamental law.

As to the second *Jacobson* element, Plaintiffs have not shown that the State's and County's restrictions are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." *Id*. Every court considering challenges to COVID-related restrictions has similarly concluded that the restrictions are not a plain, palpable invasion of rights secured by fundamental law. *See, e.g.*, *Bimber's Delwood, Inc.*, 2020 WL 6158612, at *13 (concluding that the plaintiffs could not show that New York's COVID-related restrictions on businesses, including bars and restaurants, were a plain, palpable invasion of rights secured by fundamental law); *Altman*, 464 F. Supp. 3d at 1124 (concluding that county's shelter in place order did not effect a plain, palpable invasion of the plaintiffs' Second Amendment rights). Plaintiffs do not cite a single case to the contrary.

The Court comes to the same conclusion here. As explained above, the right to earn a living is not a fundamental liberty interest that has been traditionally protected by the substantive component of the Due Process Clause. *See Franceschi*, 887 F.3d at 937; *Sagana*, 384 F.3d at 743. Thus, the State's and County's restrictions are not a "plain, palpable invasion of rights *secured by . . . fundamental law*." *Jacobson*, 197 U.S. at 30 (emphasis added). Because Plaintiffs have not satisfied both elements of *Jacobson*, Plaintiffs have not shown that they are likely to succeed on their substantive due process claims.

2. Plaintiffs are not likely to succeed on the merits of their Equal Protection claims.

Plaintiffs Mansour, Khanna, Beaudet, Evarkiou, and Richards also argue that the COVID-related restrictions on their businesses violate their rights under the Equal Protection Clause of the Fourteenth Amendment.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne*

Living Ctr., 473 U.S. 432, 439 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

The United States Supreme Court has held that business owners are not a suspect class. *See Williamson v. Lee Optical*, 348 U.S. 483, 489, 491 (1955) (concluding that a regulation on opticians would be subject to rational basis review). For this reason, other courts considering Equal Protection challenges to COVID-related restrictions brought by business owners have concluded that no suspect class is implicated. *See, e.g.*, *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (applying rational basis review to an Equal Protection challenge brought by fitness center owners); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1072 (C.D. Cal. 2020) (concluding that "California's essential/non-essential [business] distinction does not disadvantage a suspect class"). Not surprisingly, Plaintiffs concede that Plaintiffs are not members of a suspect class pursuant to United States Supreme Court and Ninth Circuit precedent. *See* Mot. at 21 (stating that rational basis review applies).[8]

Because Plaintiffs are not part of a suspect class, the Court must apply rational basis review and determine whether the restrictions are rationally related to a legitimate government interest. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) ("In cases . . . involving rational basis review, a state actor's classification comports with the Equal Protection Clause so long as it is 'rationally related to a legitimate state interest'") (quotation omitted). "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC v.*

[8] In their reply brief, Plaintiffs argue that the restrictions should be subject to "rational basis 'with a bite'" because the State's and County's regulations have resulted in the closure or restriction of hundreds of thousands of businesses. Reply at 15. However, Plaintiffs do not cite to, and the Court has not found, United States Supreme Court or Ninth Circuit precedent holding that rational basis "with a bite" would apply in these circumstances. Moreover, even if the Court considers the restrictions under the rational basis "with a bite" standard, the Court would still uphold the restrictions because they are supported by ample scientific evidence regarding the ways in which COVID-19 spreads.

Beach Comms., Inc., 508 U.S. 307, 313 (1993)). Accordingly, regulations "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320. The "burden is on [Plaintiffs] to negat[e] every conceivable basis which might support [the classification]." *Id.* (quotation omitted). Thus, courts must uphold the classification as long as it "find[s] some footing in the realities of the subject addressed by legislation." *Id.* at 321.

Under these deferential standards, every court considering Equal Protection challenges brought by business owners to COVID-related restrictions has upheld the restrictions, and Plaintiffs do not cite a single case to the contrary. *See, e.g.*, *Big Tyme Investments, LLC v. Edwards*, --- F.3d ---, 2021 WL 118628, at *6 (5th Cir. 2021) (rejecting Equal Protection challenge brought by bar owners to COVID-related restriction prohibiting consumption of alcohol at bars); *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (rejecting an Equal Protection challenge brought by fitness center owners to COVID-related restrictions closing their fitness centers).

The Court comes to the same conclusion in the instant case for two reasons. First, there are multiple compelling government interests at stake. Second, the State's and County's restrictions are rationally related to those government interests.

As to the multiple compelling government interests, the Supreme Court, the Ninth Circuit, and even Plaintiffs agree on this point. The Supreme Court has held that "stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 67. The Ninth Circuit has concluded that the State has compelling interests "in reducing community spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of its healthcare system as a result of increased hospitalizations." *South Bay*, 2021 WL 222814, at *10.

Moreover, Plaintiffs concede that the State has a strong interest in preventing hospitals

from being overwhelmed. *See* Mot. at 1 ("Governor Newsom was correct to focus on the risk that hospitals would be overrun"), 15 (acknowledging "the compelling interest in preventing hospitalizations and deaths resulting from COVID-19"). Even one of Plaintiffs' experts, Dr. Bhattacharya, concedes that restrictions might be justified "where hospital overcrowding is predicted to occur" because overcrowding and "the unavailability of sufficient medical personnel" "might induce avoidable mortality." Bhattacharya Reply Decl. ¶ 15.

Thus, the State and the County have compelling interests in slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. These compelling government interests are far greater than the legitimate government interest required for the rational basis review that the Court must undertake here.

The Court must now consider whether the restrictions applicable to Plaintiffs' businesses are rationally related to these compelling government interests. Plaintiffs present four arguments as to why the restrictions applicable to their businesses are irrational. First, Plaintiffs contend that they are just as capable of implementing social distancing measures as other businesses not subject to as stringent regulations. Second, Plaintiffs argue that they should not be treated more harshly because of the county in which they are located. Third, Plaintiffs contend that the State's restrictions are irrational because they base restrictions on PCR tests. Finally, Plaintiffs argue that it is irrational to impose restrictions on the whole population when only a subset is vulnerable to severe illness from COVID-19. The Court addresses each of these arguments in turn.

a. It is rational for the State and the County to distinguish between businesses.

First, Plaintiffs argue that Plaintiffs are "just as capable, if not more so, of implementing social distancing measures applicable to other businesses not subject to as stringent regulations." Mot. at 22. For example, Mansour argues that her facial salon should not face harsher restrictions than a doctor's or dentist's office. *Id.* However, as the County points out, there are many legitimate reasons that the County might reasonably expect medical offices to be better trained in

preventing the spread of disease than non-medical offices. Cody Decl. ¶¶ 55–56. In general, the State's and the County's distinctions between different kinds of businesses are rational because the State and the County have carefully tailored their restrictions to the risks attendant to each business. *See* Section III-B-1-a, *supra* (explaining that the State's and the County's private gatherings restrictions, Personal Care Services Directive and Mandatory Directive for Outdoor Dining bear a substantial relation to the public health interest of slowing the spread of COVID-19, protecting high-risk individuals, and preventing the overwhelming of hospitals).

b. It is rational for the State and the County to distinguish between counties.

Plaintiffs argue that their businesses should not be treated more harshly because of the county in which they are located. Mot. at 22. However, it is rational for the State to restrict activities based on the prevalence of the coronavirus in a particular county. If a gathering takes place in a county where there is a high prevalence of infection, the likelihood of coming into contact with someone who is infected and able to spread COVID-19 is increased. Watt Decl. ¶ 42; Rutherford Decl. ¶ 81; Stoto Decl. ¶¶ 10, 18. Accordingly, restricting activities based on the prevalence of the coronavirus in a particular county is not irrational.

c. It is rational for the State to rely on PCR tests.

Plaintiffs outline three reasons that it is irrational for the State's restrictions to be based on PCR tests. Mot. at 23–24. First, PCR tests are taken from a portion of the population that is more likely to test positive, including people who have been referred to testing, people who are experiencing symptoms, and people who are essential workers. Bhattacharya Decl. ¶ 27. Second, PCR tests result in a high number of false positives. *Id*. ¶¶ 28–30. Third, PCR tests do not detect risk variations between people testing positive who are likely to face mortality and people testing positive who are not. *Id*. ¶ 32; Bhatia Decl. ¶ 37. Plaintiffs thus contend that the State should use hospitalization rates, not PCR tests, in determining whether to loosen or tighten restrictions. Bhatia Decl. ¶¶ 47–49.

However, Plaintiffs are incorrect in three respects. First, even Plaintiffs' expert concedes that PCR tests are the gold standard for measuring the presence of infection in the community. Bhattacharya Reply Decl. ¶ 7. Although PCR tests will not capture spread as accurately as they would if they were given to the entire population, they do an adequate job in assessing disease spread and determining whether to tighten or loosen restrictions. *Id*. ¶ 105; Stoto Decl. ¶¶ 19, 22; Lipsitch Decl. ¶¶ 38–39. In addition, California has a wider testing program than other states, which makes the prevalence rate more reliable. Rutherford Decl. ¶ 105; Lipsitch Decl. ¶ 35. The County of Santa Clara also has a robust testing program with broader community access and greater testing capacity than other communities. Reingold Decl. ¶ 30; Lipsitch Decl. ¶ 35.

Second, although Plaintiffs argue that the State should use hospitalization rates, hospitalization rates suffer from several downfalls. Indeed, hospitalization rates lag infections in the community by several weeks. Rutherford Decl. ¶ 55; Stoto Decl. ¶ 23; Lipsitch Decl. ¶ 44; Maldonado Decl. ¶¶ 25–26. Thus, hospitalization rates show spread from several weeks ago, not recent spread. *Id*. In addition, hospitalization rates have often underestimated the severity of the pandemic. For instance, hospitalization rates can be lower at times when hospital capacity is strained and many patients who would otherwise be hospitalized are not being taken to the hospital. Stoto Decl. ¶ 23. As the Ninth Circuit recently explained in *South Bay*, "paramedics in Los Angeles County have been instructed to conserve oxygen in treating patients and not to bring patients to the hospital who have little chance of survival." 2021 WL 222814, at *4. Similarly, hospitalization rates do not capture the spread of the virus outside of hospitals. The spread of the virus outside of hospitals is a public health issue because patients who are not hospitalized with COVID-19 can face long-term effects. Cody Decl. ¶ 7; Han Decl. ¶ 20; Watt Decl. ¶ 23; Rutherford Decl. ¶¶ 23–25, 97. Undoubtedly, there are limits to any criteria that might be used, including PCR tests. However, the Court merely concludes that the State did not act irrationally in choosing to use PCR tests given the problems with using hospitalization rates.

Third, although Plaintiffs' experts argue that PCR tests are flawed because they do not detect risk variations between people testing positive who are likely to face mortality and people testing positive who are not, COVID-19 is dangerous to all populations. In the next section, the Court discusses extensively how vulnerable populations live and work with non-vulnerable populations. *See* Section III-A-2-d, *infra*. Thus, detecting COVID-19 cases among non-vulnerable people is important to protecting vulnerable populations. Accordingly, it is not irrational for the State to focus on PCR tests.

d. It is rational for the State to place restrictions on the general population, not just the vulnerable.

Plaintiffs argue that the State's and County's strategies are irrational because they have not tried to focus on vulnerable populations, such as the elderly. One of Plaintiffs' medical experts, Dr. Bhattacharya, is one of three scientists who drafted the Great Barrington Declaration, which proposes that COVID-19 be allowed to spread among young, healthy people while governments focus on preventing vulnerable people from getting it. Bhattacharya Reply Decl. ¶ 31; Lipsitch Decl. ¶ 15. Plaintiffs' other expert, Dr. Bhatia, who signed the Great Barrington Declaration, proposes that the State and the County should focus exclusively on vulnerable populations. Bhatia Decl. ¶¶ 73–84.[9]

However, Plaintiffs' argument suffers from three flaws. First, the State and the County

[9] As the State and the County stress, the vast majority of public health experts embrace restrictions on gatherings. Although Plaintiffs' experts do not, this does not mean that the State's and County's restrictions are irrational. In fact, in *Jacobson*, where mandatory vaccination for smallpox was at issue, the United States Supreme Court acknowledged that "some physicians of great skill and repute[] do not believe that vaccination is preventive of smallpox." *Jacobson*, 197 U.S. at 34. However, the Court nevertheless rejected the plaintiff's challenge and noted that "most members of the medical profession" disagreed with these physicians about the importance of vaccination. *Id*. at 34–35. "The possibility that the belief may be wrong . . . is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." *Id*. at 35. The same is true here.

have already put in place measures to protect the vulnerable. Second, it is rational for the State and the County to place restrictions on the entire population because even individuals who are not specifically vulnerable to COVID-19 can become seriously ill and die from the virus. Finally, it is rational for the State and the County to place restrictions on the entire population because vulnerable individuals have extensive contact with non-vulnerable individuals in long-term care facilities, multigenerational homes, and workplaces. The Court addresses each of these issues in turn.

First, the State and the County have already put extensive measures into place to protect vulnerable people, including the measures recommended by Plaintiffs' experts. Plaintiffs' experts recommend: (1) site infection control and prevention practices; (2) routine health care worker screenings; (3) prohibiting staff from coming to work sick; (4) outbreak response; (5) training; (6) monitoring; and (7) testing asymptomatic health care workers. Bhatia Decl. ¶¶ 88–89. The State's and County's long-term care facilities already implement these measures and others to slow the spread of COVID-19.

The State has issued guidelines and directives that required long-term care facilities to undertake precautions, including (1) cleaning and disinfecting high-touch surfaces; (2) screening residents for COVID-19 symptoms every day; (3) excluding employees who display symptoms of COVID-19; (4) requiring employees and residents to wash their hands upon entering the facility; (5) limit entry only to individuals who need entry for prevention, containment, and mitigation measures; (6) requiring staff to wear face coverings at all times and remind residents that they are required to wear face coverings as much as practically possible; and (7) requiring training of staff on prevention and control measures. Tovmasian Decl. ¶¶ 12–16, 24; Steinecker Decl. ¶¶ 10, 19–24. The State also requires facilities to engage in testing, including surveillance testing even if they do not currently have a positive COVID-19 case. Tovmasian Decl. ¶¶ 18–21, Steinecker Decl. ¶ 15, 19. The County has also taken targeted measures to protect vulnerable populations.

Those measures include implementing regular staff testing in long-term care facilities, providing infection control protocols, and visiting facilities to make recommendations on how best to implement infection control. Han Decl. ¶ 9; Garcia Decl. ¶ 14.

Second, it is rational for the State and the County to place restrictions on the entire population because many non-vulnerable people die or become seriously ill after being infected with COVID-19. About twenty percent of those who have died of COVID-19 in the United States have been younger than 65 years old. Lipsitch Decl. ¶ 28. In addition, nearly two thousand people who have died of COVID-19 are younger than 30 years old. *See CDC COVID Tracker*.

Additionally, Dr. Bhattacharya's declaration, which focuses on mortality, ignores the serious long-term effects that plague many non-vulnerable people who have recovered from COVID-19. Bhattacharya Decl. ¶¶ 32–39. Young people are at risk for serious and long-term effects from COVID-19, including cardiovascular, neurologic, renal, and respiratory damage, psychiatric effects, and loss of limbs from blood clotting. Cody Decl. ¶ 7; Han Decl. ¶ 20; Watt Decl. ¶ 23; Rutherford Decl. ¶¶ 23–25, 97. For example, college football players who had recovered from asymptomatic or mildly symptomatic COVID-19 infections were found to have a high rate of myocarditis, which can lead to cardiac arrest with exertion. Rutherford Decl. ¶ 25.

In addition, many young people have underlying conditions. As discussed above, *supra* Section I-A-3, chronic medical conditions are largely a subset of COVID-19 underlying conditions. Yet, approximately six in ten Americans have been diagnosed with at least one chronic medical condition, and four in ten have been diagnosed with more than one chronic medical condition. Reingold Decl. ¶ 17. Moreover, in Latino and African-American communities, a higher percentage of residents have diabetes, which make them more susceptible to becoming severely ill from COVID-19. Garcia Decl. ¶ 13. Simultaneously, a lower percentage of Latino and African-American community members have healthcare coverage, meaning that they are less able to get care if infected with COVID-19. *Id*.

Third, it is rational for the State and the County to place restrictions on the entire population because vulnerable people have extensive contact with non-vulnerable individuals in long-term care facilities, multigenerational homes, and essential workplaces. The Court addresses each of these settings in turn.

Looking at care facilities, vulnerable people who live in care facilities are in close contact on a regular basis with the staff, who live in the community. Rutherford Decl. ¶ 116; Stoto Decl. ¶ 35. Thus, higher levels of community spread can lead to spread in care facilities. Rutherford Decl. ¶ 116; Han Decl. ¶ 14. Accordingly, a recent report showed that COVID-19 cases in nursing homes have tracked the community spread of COVID-19 since September of 2020. Lipsitch Decl. ¶ 26. For example, in La Crosse, Wisconsin, researchers were able to trace COVID-19 clusters at two nursing homes, which caused two deaths, back to gatherings and parties at three local universities. Cody Decl. ¶ 37.

In addition, many vulnerable people live in multigenerational households. Garcia Decl. ¶ 8; Lipsitch Decl. ¶ 25. According to one study, 20 percent of Americans live in a multigenerational home. Maldonado Decl. ¶ 21. Vulnerable people are especially likely to live or work with less vulnerable people in communities of color, immigrant communities, and low-income communities. Garcia Decl. ¶ 8. In these communities, people often live in crowded homes, making it difficult for them to isolate from other household members. *Id*. As Plaintiffs' expert acknowledges, older people living with working-age adults have a higher risk of COVID-19 than older people living with other older people. Bhattacharya Reply Decl. ¶ 54. Because older people live and work with younger people, COVID-19 cases in older people track with COVID-19 cases in younger people. Rutherford Decl. ¶ 96.

Plaintiffs' expert suggests that vulnerable people who live in multigenerational households could temporarily live in another setting, such as empty hotel rooms that have been provided for homeless populations. Bhattacharya Reply Decl. ¶ 54. However, even where the County has

offered to provide separate housing or other support for vulnerable individuals who live with other household members, many factors lead them to be uncomfortable or unwilling to accept it. For example, some vulnerable individuals distrust the government, while others are unwilling to separate from their family members, for whom they might provide childcare and other support. Garcia Decl. ¶ 12. For example, many older people are the primary caregivers for their grandchildren. Maldonado Decl. ¶ 17.

Furthermore, many vulnerable people also work at essential jobs, increasing their potential exposure to COVID-19. Garcia Decl. ¶¶ 9–10. Even those who are vulnerable are often themselves breadwinners in their family, which means that they have to work outside the home to support their families. *Id.* ¶ 13. This is especially true in communities of color and low-income communities. *Id.* ¶ 13.

Plaintiffs' expert also suggests that older people who work could be permitted to work from home. Bhattacharya Reply Decl. ¶ 53. However, this proposal ignores the reality that many older people work in essential jobs, where working from home is not possible. Garcia Decl. ¶¶ 9–10. Although Plaintiffs' expert proposes that those who cannot work from home be able to take a funded 3 to 6 month sabbatical, Plaintiffs' expert does not address the distrust of the government and unwillingness to accept help that persists, particularly in communities of color and low-income communities that have more essential workers. Garcia Decl. ¶ 12.

In sum, because of the numerous connections between the vulnerable and other members of the community, COVID-19 spread in the community results in COVID-19 spread among the vulnerable. For these reasons, the vast majority of public health experts reject an approach that would focus solely on vulnerable populations without limiting spread in the community. Stoto Decl. ¶ 14; Lipsitch Decl. ¶ 15; Maldonado Decl. ¶ 20. A strategy that solely focused on vulnerable people without addressing community spread would result in increased COVID-19 spread, hospitalizations, and deaths. Lipsitch Decl. ¶ 24; Rutherford Decl. ¶¶ 115–117. For

example, in Maine, an indoor wedding attended by 62 people resulted in more than 180 infections, including among people living at a long-term healthcare facility and at a jail. Cody Decl. ¶ 37. Eight people who did not attend the wedding died. *Id*. In Michigan, 187 infections were connected to an indoor bar and restaurant with a live DJ and an open dance floor. *Id*. Of the total cases traced back to the restaurant, 144 were people who had been to the venue and 43 were family members, friends, and other contacts who had not. *Id.*

The downfalls of a targeted strategy can be seen in the example of Sweden. Sweden tried to implement an approach targeted towards the elderly and nursing homes, and as a result, seven percent of residents in nursing homes in Stockholm died. Lipsitch Decl. ¶ 27; Rutherford Decl. ¶¶ 115–117. Thus, Sweden is now implementing policies directed at slowing community spread. Lipsitch Decl. ¶ 27.

Because Plaintiffs have not met the high bar of demonstrating that the State's and County's restrictions are irrational, Plaintiffs have not shown that they are likely to succeed on the merits of their Equal Protection claims.

3. Plaintiffs are not likely to succeed on the merits of their free speech and assembly claims.

Plaintiffs Tandon and the Gannons argue that the State's and the County's private gatherings restrictions violate their First and Fourteenth Amendment rights to free speech and assembly. As explained above in Section III-A, *supra*, the State prohibits indoor gatherings and limits private outdoor gatherings to three households or fewer. However, the State's private gatherings restrictions do not apply to the political campaign events Tandon wishes to hold. Accordingly, Tandon's gatherings are limited only by the County's private gatherings restrictions, which prohibit indoor gatherings[10] and limit outdoor gatherings to 200 people. Bussey Decl. Exhs.

[10] In the instant motion, Tandon challenged the County's 100 person limit on indoor gatherings. Mot. at ii; *see supra* footnote 7. However, before Defendants filed their opposition to the instant

A, G.

The Court first considers whether Tandon's claims are moot now that the 2020 election has passed. After concluding that Tandon's claims are not moot, the Court analyzes the merits of Plaintiffs' free speech claims. As Plaintiffs note, "[t]he right of peaceable assembly is a right cognate to th[at] of free speech." Mot. at 12 (quoting *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937)); *accord Kuchenreuther v. City of Milwaukee*, 221 F.3d 967, 972 n.16 (7th Cir. 2000) ("We evaluate free speech and free assembly claims under the same analysis."). Indeed, Plaintiffs' freedom of assembly argument cites freedom of speech cases. Mot. at 12–18 (citing, *e.g.*, *Reed*, 576 U.S. 155). Thus, the Court's analysis of Plaintiffs' free speech claims applies equally to Plaintiffs' free assembly claims.

a. Tandon's free speech and assembly claims are not moot.

The State and the County argue that Tandon's claims are moot because the 2020 election has passed. State Opp'n at 7–8; County Opp'n at 8–9. The Court disagrees because Tandon has expressed his intent to run in 2022, and Tandon has stated that he needs to meet with advisors, donors, and constituents to support his 2022 campaign in the coming months, while the State and the County restrictions are likely to remain in effect.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). "An 'actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "A case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003) (quoting *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001)).

---

motion, the County updated its restrictions to prohibit all indoor gatherings. Bussey Decl. Exh. A (stating that "all indoor gatherings are currently prohibited").

However, there is an exception to the mootness doctrine if a case is "capable of repetition, yet evading review." *Lewis*, 494 U.S. at 481. Under this exception, cases for prospective relief can go forward "despite abatement of the underlying injury . . . where the following two circumstances [are] simultaneously present: '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam)).

The Court concludes that these two circumstances are met in this case. First, Tandon's challenge is a "controversy evading review" because the 2020 election was too short to be fully litigated before it ended. *Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010). "Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter*, 319 F.3d at 490 (concluding that an election challenge was a controversy evading review); *see also Wolfson*, 616 F.3d at 1054 (same); *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) (same).

"To satisfy the second requirement, that the action is capable of repetition, [a candidate] must establish a reasonable expectation that he will be subjected to the same action or injury again." *Wolfson*, 616 F.3d at 1054. A candidate can meet this requirement even after the election has passed where the candidate "has subsequently announced an intent to seek office in a future election." *Id.* at 1055; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008) (concluding that a challenge to self-financing rules was capable of repetition yet evading review where the election had passed but the candidate subsequently announced an intent to self-finance another bid for a House seat).

The County argues that Tandon's claims are moot because Tandon has not expressed an intent to seek office in a future election. County Opp'n at 8. However, in a sworn declaration, Tandon states that he is "planning for another Congressional run in 2022." Tandon Reply Decl. ¶¶

5–6. Thus, Tandon "has subsequently announced an intent to seek office in a future election," which means that he can establish a reasonable expectation that he will be subject to the same action or injury again. *Wolfson*, 616 F.3d at 1055.

The County argues that the likelihood that Tandon will face the same action or injury again is "remote and speculative" because it is unclear what level of community transmission of COVID-19, and what restrictions on gatherings, will exist leading up to the 2022 election. County Opp'n at 9. However, Tandon states in his declaration that he will need to meet with advisors, donors, and constituents in the coming months, while the restrictions remain in place. Tandon Reply Decl. ¶¶ 5–6. Thus, the Court concludes that Tandon's claim is not moot and proceeds to consider the free exercise and free speech claims on the merits.

b. Plaintiffs are not likely to succeed on the merits of their free speech and assembly claims.

The First Amendment, incorporated against the states by the Fourteenth Amendment, prohibits states "from enacting laws 'abridging the freedom of speech, . . . or the right of the people peaceably to assemble.'" *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1020–21 (9th Cir. 2009) (quoting U.S. Const. amend. I). Under the First Amendment, "certain types of speech enjoy special status." *Id.* at 1021. In particular, "[p]olitical speech is core First Amendment speech, critical to the functioning of our democratic system," so it "'rest[s] on the highest rung of the hierarchy of First Amendment values.'" *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

To evaluate a free speech claim, the Court must first decide whether a law restricting speech is content based or content neutral. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017). "Content-based laws," which are "those that target speech based on its communicative content," must satisfy strict scrutiny, meaning that "the government [must] prove[] that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In addition, laws must satisfy strict scrutiny if they are facially

content neutral, but "cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). However, if "a law does not 'suppress[] expression out of concern for its likely communicative impact,'" the law must only satisfy intermediate scrutiny. *Recycle for Change*, 856 F.3d at 669–70 (quoting *United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016) (en banc)).

Accordingly, for the reasons discussed below, the Court reaches the following conclusions. First, the State's and the County's private gatherings restrictions are content neutral. Second, because the State's and the County's private gatherings restrictions are content neutral, the Court applies intermediate scrutiny and concludes that the restrictions satisfy intermediate scrutiny. Finally, in the alternative, even assuming that the State's and the County's private gatherings restrictions are not content neutral, the Court applies strict scrutiny and concludes that these restrictions satisfy strict scrutiny.

i. The State's and the County's private gatherings restrictions are content neutral.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. "The 'crucial first step' in determining whether a law is content based is to 'consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys.'" *Recycle for Change*, 856 F.3d at 670 (quoting *Reed*, 576 U.S. at 163). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163. Where a restriction "does not, on its face, discriminate on the basis of content," the restriction is content neutral. *Recycle for Change*, 856 F.3d at 670. Accordingly, "blanket bans applicable to all speakers are content neutral." *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1295 & n.5 (9th Cir. 2015).

Courts have concluded that the State's COVID-related restrictions are blanket bans that are thus content neutral. In *Givens v. Newsom*, an individual who wished to protest and a congressional candidate who wished to hold a rally sought permits for in-person gatherings at the State Capitol. 459 F. Supp. 3d 1302, 1308 (E.D. Cal. 2020), *appeal dismissed*, --- F. App'x ---, 2020 WL 7090826 (9th Cir.). However, their permits were denied due to the State's COVID-related restrictions on mass gatherings. *Id.* The individual and the congressional candidate sought a temporary restraining order and argued that the restrictions violated their First Amendment rights. *Id.* at 1307, 1309. The district court rejected their application for a temporary restraining order and concluded that "[t]he State's order, and the resulting moratorium on permits, are, beyond question, content-neutral." *Id.* at 1312. The district court emphasized the fact that the "temporary moratorium on all permits for in-person gatherings applies to all applicants." *Id.* (emphasis omitted). The same reasoning applies to the gatherings restrictions here.

The Gannons challenge the State's private gatherings restrictions. In counties at the most severe or widespread tier, these restrictions prohibit indoor private gatherings of individuals outside the immediate household and restrict outdoor private gatherings to three households. *See supra* Section III-A; Haddad Decl. Exh. 12; Dunn Reply Decl. Exh. 4. Specifically, the State defines gatherings as "social situations that bring together people from different households at the same time in a single space or place." *Id*. The State's private gatherings restrictions are content neutral because they apply to all gatherings regardless of the speech to be shared at that gathering. *Recycle for Change*, 856 F.3d at 670 ("Here, the Ordinance is content neutral because it does not, on its face, discriminate on the basis of content . . . ."). Indeed, the State's private gatherings restrictions are blanket bans on all gatherings, and blanket bans are content neutral. *Santa Monica Nativity Scenes Comm.*, 784 F.3d at 1295 & n.5 (holding that "blanket bans applicable to all speakers are content neutral").

Tandon challenges the County's private gatherings restrictions. As discussed in Section

III-A above, the County's private gatherings restrictions: (1) prohibit indoor gatherings, which are also banned by the State's private gatherings restrictions; (2) limit all outdoor gatherings to 200 people; (3) and require that the outdoor space must be large enough to permit attendees to maintain six feet of distance. *Id*. Thus, regardless of the County's Blueprint tier, the County limits to 200 outdoor gatherings that are "an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, party, performance, movie theater operation, barbecue, protest, or picnic." Bussey Decl. Exhs. A, G. The State's private gatherings restrictions do not regulate these gatherings. These County restrictions apply regardless of the purpose of the gathering. *Id*. The County's private gatherings restrictions are thus akin to blanket bans applicable to all speakers, which are content neutral. *Santa Monica Nativity Scenes Comm*., 784 F.3d at 1295 & n.5 (holding that "blanket bans applicable to all speakers are content neutral."). Accordingly, the restrictions challenged by Tandon are also content neutral.

Plaintiffs argue that the State's and the County's private gatherings restrictions are not content neutral because their gatherings are being treated more harshly than other activities. Reply at 7. Plaintiffs assert that, while their indoor gatherings are prohibited, "the State and County have allowed people to gather indoors at airports, shopping centers, retail stores, hair salons, tattoo parlors, body art venues, piercing stores, pet grooming outlets, and more, so long as those present can maintain six feet of distance." *Id*. For example, Plaintiffs point out that Tandon could get a tattoo indoors, but could not gather indoors with his supporters for a political event. *Id*.

Plaintiffs' argument is unpersuasive for two reasons. First, the Ninth Circuit has recently rejected a similar argument. Second, the Court's independent review confirms that the commercial activities to which Plaintiffs point are distinct from Plaintiffs' private gatherings.

In *South Bay*, the Ninth Circuit concluded that the socially distanced commercial activities

to which Plaintiffs point had a lower risk of spreading COVID-19 than gatherings. Specifically, the Ninth Circuit's decision upheld the Blueprint's restrictions on houses of worship, which prohibit indoor worship services in counties in the widespread tier, and concluded that the Blueprint's restrictions were narrowly tailored to slow the spread of COVID-19, protect high-risk individuals from infection, and prevent the overwhelming of the healthcare system. 2021 WL 222814, at *12–*14. The plaintiffs argued that the State's restrictions were not narrowly tailored because the State permitted numerous non-religious activities, including grocery and retail shopping and personal care services. *Id.* at *11.

Rejecting the plaintiffs' argument, the Ninth Circuit concluded that worship services were distinct from, and more likely to spread COVID-19 than, socially distanced commercial activities. The Ninth Circuit explained that, in commercial settings, "patrons typically have the intention of getting in and out of grocery and retail stores as quickly as possible." *Id*. at *12. By contrast, "the very purpose of a worship service is to congregate as a community." *Id*. The Ninth Circuit also explained that ventilation was better in some commercial settings such as grocery stores, which are equipped with high-functioning air conditioning systems that increase air flow. *Id*. Finally, the Ninth Circuit emphasized the plethora of mandatory industry regulations aimed at preventing the spread of COVID-19 that applied to the grocery, retail, personal care services, and film industries, among others. *Id*. at *12–*14. These restrictions included use of plexiglass, frequent disinfection of commonly used surfaces, and frequent testing of workers, including in the film industry. *Id*.

In the instant case, the Court also concludes that the socially distanced commercial activities cited by Plaintiffs are different in kind from Plaintiffs' gatherings. Indeed, "evidence suggests that gatherings may pose a higher risk of transmission than other kinds of activities that remain subject to different restrictions." Cody Decl. ¶ 59. Plaintiffs' gatherings are markedly more risky in at least six different ways: (1) people are together for a longer time; (2) singing, chanting,

shouting, loud talking, and sustained conversations are more likely to occur; (3) ventilation is poorer; (4) masking and social distancing are less likely; (5) private gatherings are not required to implement safety measures mandated by health and safety codes and industry regulations; and (6) large numbers of people may be in the same place at the same time. The Court addresses each distinction in turn.

First, people at Plaintiffs' gatherings are together for a longer time. In commercial environments, such as retail and grocery stores, "when people from different households are together in a grocery store, they are together for a shorter duration of time as compared to attendees at a coordinated gathering where attendees linger." Cody Decl. ¶ 59. Further, grocery shoppers may be less likely to be in close proximity to other shoppers, as opposed to attendees at a gathering who have social connections to one another. *See also South Bay*, 2021 WL 222814, at *12 (explaining that grocery stores are distinct from house of worship services because "patrons typically have the intention of getting in and out of grocery and retail stores as quickly as possible."). Thus, the risk of transmission is generally less in a setting with brief contact between individuals as compared to a setting such as a gathering that promotes sustained contact. The risk of transmission "increases with the duration of the gathering, whether it takes place indoors or outdoors." Rutherford Decl. ¶ 78. The main mechanism for COVID-19 transmission is an infected person exposing others to virus-containing droplets or aerosols. *Id.* ¶ 79.

Second, unlike people in commercial gatherings, people at Plaintiffs' gatherings often have social connections to one another and are coming together for the purposes of being together. Cody Decl. ¶ 59; Rutherford Decl. ¶ 82. At Plaintiffs' gatherings, people are likely to be in extended conversations. Rutherford Decl. ¶ 82. "Even sustained conversations between individuals, when they are in close proximity in indoor spaces, or in outdoor spaces in which social distance is not maintained, carry increase risk of transmission." Rutherford Decl. ¶ 79. In some environments—such as a Bible study or political event—people might even sing or chant.

By contrast, singing, chanting, shouting, and loud talking are uncommon in commercial environments, like grocery and retail stores. Singing, chanting, shouting, and loud talking are more likely to spread COVID-19 because they produce more viral droplets and particles—and project those droplets further. Rutherford Decl. ¶¶ 29, 79; Reingold Decl. ¶¶ 20–22; Cody Decl. ¶ 35. For instance, Plaintiffs propose Bible study groups and gatherings to debate policy issues—gatherings which "involve groups of unrelated individuals from different households or 'bubbles' coming together for the purpose of being together and engaging in extended conversation and interaction in close proximity to one another." Rutherford Decl. ¶ 82.

Third, ventilation tends to be poorer at Plaintiffs' gatherings. "There is in particular heightened transmission risk from indoor gatherings taking place in buildings that have poor air circulation, such as in private homes." Rutherford Decl. ¶ 76. By contrast, some commercial activities take place in large spaces. Others include systems that increase ventilation. For example, "grocery stores are 'almost always' equipped with high-functioning air conditioning systems that increase ventilation and air flow." *South Bay*, 2021 WL 222814, at *12. Others take place outdoors. *See* Dunn Decl. Exh. 23 (stating that some personal care services are permitted to take place outdoors). In environments with better ventilation, the virus disperses more easily, preventing it from accumulating into doses large enough to overcome the immune system. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Ventilation is important even where people properly wear face coverings. "The increased risk of transmission resulting from vocalization and other activities involving increased exhalation force that are commonly engaged in during gatherings *is reduced but not eliminated* where all of the participants wear face coverings." Rutherford Decl. ¶ 80 (emphasis added).

Fourth, masking and social distancing are less likely at Plaintiffs' gatherings than in commercial settings. Under the State's restrictions, commercial environments require masking and social distancing, a requirement that can be enforced by commercial workers. *See* Haddad Decl.

Exh. 9. On the other hand, at Plaintiffs' gatherings, it is "uncertain whether participants in these gatherings would maintain social distancing and face coverings during the entirety of the gatherings." Rutherford Decl. ¶ 84. Indeed, many gathering spaces in the home—such as kitchen tables and living rooms—do not provide six feet of distance between persons. "[T]he closer the proximity between individuals who gather, and the longer they are in close proximity, the more opportunity there is for the virus to be transmitted via droplets or aerosolized particles containing the virus." Rutherford Decl. ¶ 74.

Fifth, Plaintiffs' gatherings are not part of a regulated industry. By contrast, commercial retail environments are subject to mandatory industry guidance, which include creation of a COVID-19 prevention plan, cleaning and disinfecting of frequently used surfaces, and screening of workers. Haddad Decl. Exh. 9; Dunn Decl. Exhs. 17–27; *see also South Bay*, 2021 WL 222814, at *12 (explaining that commercial activities were distinct from worship services because they included "plexiglass at checkout, frequent disinfection of commonly used surfaces such as shopping carts, and the closure of any areas that encourage congregating"). Personal care services are also subject to mandatory industry guidance. Dunn Decl. Exhs. 23, 24, 42. For example, workers must wear a secondary barrier, like goggles or a face shield, in addition to a mask, when providing services on clients who cannot wear a mask. *Id.* As to filming, "this sector is *more strictly* regulated than many others." *South Bay*, 2021 WL 222814, at *13 (emphasis in original). For example, "filming in the state resumed only after the studios and unions reached an agreement concerning safety guidelines." *Id*. That agreement requires tri-weekly testing. *Id*. In addition, there are special protocols for makeup, hair styling, costumes, and props. *Id*. These restrictions lower the risk that COVID-19 will be spread. Moreover, the State can enforce industry guidance, including by imposing a misdemeanor conviction, $1,000 fine, and six months imprisonment. *See* Dunn Decl. Exhs. 2, 3 (referencing Cal. Gov't Code § 8665); Cal. Gov't Code § 8665.

Sixth, Plaintiffs' gatherings can involve many more people than commercial interactions.

Some commercial settings, such as personal care services, involve only "small numbers of individuals interacting." *Id*. The more people who are together, the more likely it is that COVID-19 will be spread. Watt Decl. ¶ 42; Rutherford Decl. ¶ 77.

Accordingly, the State's and the County's private gatherings restrictions are content neutral and need only satisfy intermediate scrutiny. *Recycle for Change*, 856 F.3d at 669–70 (applying intermediate scrutiny to a content neutral regulation). The Court next considers whether the State's and the County's private gatherings restrictions satisfy intermediate scrutiny.

ii. The State's and County's content neutral restrictions satisfy intermediate scrutiny.

Under intermediate scrutiny, a regulation is justified "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Wilson v. Lynch*, 835 F.3d 1083, 1096 (9th Cir. 2016) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The Court addresses each element in turn.

(a) The State's and County's restrictions are within the constitutional power of the government.

The State's and the County's private gatherings restrictions are within the constitutional power of the government. A restriction is within the government's constitutional powers if the government can constitutionally regulate the subject in question. *Wilson*, 835 F.3d at 1096; *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014). Plaintiffs do not argue that the State or the County is prohibited from regulating private gatherings. Accordingly, the Court concludes that the State's and the County's private gatherings restrictions are within the constitutional power of the government.

(b) The State's and County's restrictions further the compelling interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system.

The State's and the County's private gatherings restrictions are directed to slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. As discussed above, *supra* Section III-B-2, the Court concludes that these are compelling government interests.

(c) Slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system are unrelated to the suppression of free expression.

Slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system are unrelated to the suppression of free expression. As explained above, the State's and the County's private gatherings restrictions are blanket bans applicable to all gatherings. *See* Section III-B-3-b-i, *supra*. Thus, the State's and the County's private gatherings restrictions do not prevent the expression of any particular message or viewpoint. Accordingly, the Court concludes that the compelling government interests at issue here are unrelated to the suppression of free expression. *Tomsha-Miguel*, 766 F.3d at 1048 (9th Cir. 2014) (concluding that a statute was unrelated to the suppression of free expression because the statute "does not prevent the expression of any particular message or viewpoint") (quotation omitted).

(d) The incidental restriction on speech and assembly is no greater than is essential to slow the spread of COVID-19, protect high-risk individuals from infection, and prevent the overwhelming of the healthcare system.

Finally, the Court considers whether the State's and the County's private gatherings restrictions are "no greater than is essential to the furtherance of" the compelling government interests at stake here. *Wilson*, 835 F.3d at 1096 (quotation omitted). In the context of content neutral laws, a regulation need "not [be]. . . the least restrictive or least intrusive means" of achieving the governmental interest. *Ward*, 491 U.S. at 798. Rather, the regulation must

"promote[ ] a substantial government interest that would be achieved less effectively absent the regulation . . . . [and] the means chosen [must] not [be] substantially broader than necessary to achieve the government's interest." *Id*. at 799–800.

The Court concludes that the State's and the County's private gatherings restrictions are no greater than is essential to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of the healthcare system for the following three reasons. First, the Ninth Circuit has held that some of the State's restrictions are narrowly tailored in the context of strict scrutiny, a higher standard than the intermediate scrutiny at issue here. Second, the Court's independent review of the State's and the County's private gatherings restrictions confirms they promote compelling government interests that would be achieved less effectively absent the restrictions. Finally, the State's and the County's private gatherings restrictions are not substantially broader than necessary to achieve the compelling government interests at issue here.

First, in *South Bay*, the Ninth Circuit concluded that some of the State's restrictions were narrowly tailored to achieve the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the healthcare system from being overwhelmed. *South Bay*, 2021 WL 222814, at *10–*14.[11] The Ninth Circuit analyzed the State's restrictions on houses of worship in the widespread tier, which prohibit indoor worship services, but permit outdoor worship services with no limit on attendance. *Id*. at *8.[12] The Ninth Circuit explained that these restrictions were narrowly tailored to slow the spread of COVID-19

[11] Following the Ninth Circuit's opinion in South Bay, the Ninth Circuit decided *Harvest Rock Church v. Newsom*, which followed *South Bay*. 2021 WL 235640, at *1 (9th Cir. 2021).

[12] At the time of the Ninth Circuit's opinion in *South Bay*, the Regional Stay at Home Order remained in effect. However, the Ninth Circuit considered not only the restrictions in the Regional Stay at Home Order but also the restrictions in the Blueprint. *South Bay*, 2021 WL 222814, at 8 n.20 ("Because the State considered the same neutral risk criterial in formulating both the Regional Stay at Home Order and the Blueprint . . . we consider the framework as a whole.").

because the State had used objective factors to evaluate the risk that COVID-19 would be spread by specific activities, including services at houses of worship. *Id.* at *10–*11. The State's analysis had concluded that services at houses of worship were more likely to spread COVID-19 than other activities, such as grocery shopping, retail shopping, and personal care services. *Id.* at *11–*14. Accordingly, the Ninth Circuit concluded that some of the Blueprint's restrictions satisfied the narrow tailoring requirement in the context of strict scrutiny, a higher threshold than the narrow tailoring requirement in the context of intermediate scrutiny. *See Ward*, 491 U.S. at 798. Thus, if the Ninth Circuit held that the Blueprint's restrictions satisfied strict scrutiny, certainly the restrictions would satisfy the lower intermediate scrutiny.

Second, the State's and the County's private gatherings restrictions promote the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system, which would be achieved less effectively absent the restrictions. Indeed, gatherings are especially likely to result in the spread of COVID-19. Watt Decl. ¶¶ 42–44, Rutherford Decl. ¶¶ 60, 76–77; Cody Decl. ¶¶ 34–35. Gatherings are particularly risky because COVID-19 is often spread when individuals are in close proximity with an infected person for an extended period of time, which allows a sufficient dose of viral droplets or particles to move from an infected person to others. Rutherford Decl. ¶ 31; Watt Decl. ¶¶ 29, 33. The risk for gatherings, especially indoor gatherings, remains high even when attendees socially distance, wear face coverings, and use sanitizer. Watt Decl. ¶ 44, Rutherford Decl. ¶¶ 60, 75–77. COVID-19 is 18.7 times more likely to be transmitted in a closed environment than in an open-air environment. Watt Decl. ¶ 44. Summarizing the risks of indoor private gatherings, Dr. George Rutherford, Professor of Epidemiology and Biostatistics at the U.C. San Francisco School of Medicine, explains:

> As discussed, the proposed indoor gatherings would have a substantial risk of transmission, including because of the heightened risks involved in gatherings that bring together individuals from

> different households who are not regularly in contact with each other, gatherings that take place indoors, the likely close proximity of the individuals engaged in the activity, and the interaction and vocalization between individuals in close proximity to one another that would be expected at a gathering of this nature.

Rutherford Decl. ¶ 83.

Therefore, the consensus of public health experts is that limits on gatherings are essential to slow the spread of COVID-19. Rutherford Decl. ¶ 50; Stoto Decl. ¶ 15; Watt Decl. ¶¶ 51–52; Reingold Decl. ¶ 27; Cody Decl. ¶ 75; Maldonado Decl. ¶¶ 13, 18. Because of the unique dangers of gatherings in spreading COVID-19, slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system would be achieved less effectively without the State's and County's restrictions.

Third, the State's and the County's private gatherings restrictions are not substantially broader than necessary to achieve the compelling government interests in slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system for the following three reasons.

One, the State's and the County's private gatherings restrictions limit attendance. Haddad Decl. Exh. 12 (State Blueprint, limiting gatherings in counties in the widespread tier to three households outdoors); ECF No. 61 Exh. 3 (County's restrictions, limiting gatherings to 200 people outdoors). Limits on attendance are necessary because the bigger a gathering is, the more risk there is that COVID-19 will be spread. Watt Decl. ¶ 42. A bigger gathering increases the risk of spreading COVID-19 because it increases the number of people who can be infected and the likelihood that an infected person is present. *Id*.

Two, the State's and the County's private gatherings restrictions are significantly more restrictive of indoor gatherings than of outdoor gatherings. *See* Haddad Decl. Exh. 12 (State Blueprint, prohibiting indoor gatherings but allowing outdoor gatherings in counties in the widespread tier); ECF No. 61 Exh. 3 (County's restrictions, prohibiting indoor gatherings and

permitting outdoor gatherings of 200 people or fewer). This distinction is aligned with the way that COVID-19 spreads. One study found that the likelihood of transmitting COVID-19 was 18.7 times greater in a closed environment than in an open-air environment. Watt Decl. ¶ 44. COVID-19 is more easily spread indoors because the virus disperses less easily indoors and can remain in the air for a longer period of time, which allows it to accumulate into large enough doses to infect people. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Accordingly, the CDC advises that activities are safer when they are held in outdoor spaces. Cody Decl. ¶ 31. Following this guidance, the State and the County allow outdoor activities that are banned indoors. For instance, singing, chanting, and shouting—activities that generate droplets and aerosols—are allowed outdoors if participants wear face coverings and socially distance by at least six feet. Watt Decl. ¶ 81.

Three, the State's private gatherings restrictions are more restrictive of gatherings in counties with greater spread of COVID-19. *See* Haddad Decl. Exh. 12 (State Blueprint, permitting only outdoor gatherings with three households in the widespread tier and indoor gatherings with three households in the substantial tier). This tiered system recognizes that the more people are infected in a county, the more likely a gathering in that county has an infected person present. Rutherford Decl. ¶ 81. The tiered system thus imposes stricter restrictions in higher risk counties. By the same token, the tiered system minimizes restrictions in counties with lower prevalence of infection.

Thus, the Court concludes that the State's and County's private gatherings restrictions are no greater than are essential to slow the spread of COVID-19, protect high-risk individuals from infection, and prevent the overwhelming of the healthcare system. In sum, although the State's and the County's private gatherings restrictions are significant, the restrictions are being imposed to address the worst public health crisis in one hundred years, and "'narrow' in the context of a public health crisis is necessarily wider than usual." *Givens*, 459 F. Supp. 3d at 1313 (concluding

that California's ban on gatherings was a content neutral restriction that survived intermediate scrutiny). Thus, the Court concludes that the State's and the County's private gatherings restrictions satisfy intermediate scrutiny.

iii. Even assuming that the State's and the County's private gatherings restrictions are content based, they are narrowly tailored to serve a compelling government interest.

Even assuming that the State's and the County's private gatherings restrictions are content based, they nevertheless are constitutional because they are narrowly tailored to serve a compelling government interest and thus satisfy strict scrutiny. *Reed*, 576 U.S. at 163. The Court first considers whether the restrictions serve a compelling government interest then discusses whether the restrictions are narrowly tailored.

(a) Slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system are compelling government interests.

As discussed above, *supra* Section III-B-2, the Court concludes that the State and the County have compelling government interests in slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system.

(b) The State's and the County's private gatherings restrictions are narrowly tailored.

The State's and the County's private gatherings restrictions are narrowly tailored to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of hospitals for three reasons. First, both the Ninth Circuit and other district courts have held that some of the Blueprint's restrictions are narrowly tailored. Second, the Court's independent review of the State's and County's restrictions confirms they are narrowly tailored. Third, Plaintiffs' proposed alternatives to the State's and the County's private gatherings restrictions are insufficient to halt the spread of COVID-19.

First, on January 22, 2021, the Ninth Circuit concluded that the Blueprint's restrictions on houses of worship in the widespread tier, which prohibit indoor worship services but permit

outdoor worship services with no limit on attendance, were narrowly tailored to achieve the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. *South Bay*, 2021 WL 222814, at *8, *10–*14.[13] The Ninth Circuit explained that these restrictions are narrowly tailored because the State used objective factors to evaluate the risk that COVID-19 would be spread by specific activities, including services at houses of worship. *Id*. at *10–*11. The State's analysis concluded that services at houses of worship were more likely to spread COVID-19 than other activities, such as grocery shopping, retail shopping, and personal care services. *Id*. at *11–*14.

Other district courts analyzing the same restrictions have also concluded that they are narrowly tailored to achieve the compelling government interest of slowing the spread of COVID-19. *See Harvest Rock Church v. Newsom*, Case No. EDCV 20-6414-JGB, 2020 WL 7639584, at *9 (C.D. Cal. Dec. 21, 2020), *aff'd in part and rev'd in part*, --- F.3d ---, 2021 WL 235640 (9th Cir. 2021) ("California's Blueprint is . . . painstakingly tailored to address the risks of [COVID-19] transmission specifically"); *South Bay*, Case No. 20-CV-00865-BAS-AHG, 2020 WL 7488974, at *9 (S.D. Cal. Dec. 21, 2020), *aff'd*, --- F.3d ---, 2021 WL 222814 (9th Cir. 2021) (concluding that "California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed the different exemptions to match its goal of reducing community spread").

In the instant case, the Court similarly concludes that the State's and the County's private gatherings restrictions are narrowly tailored to reduce community spread, protect high-risk individuals, and prevent the healthcare system from being overwhelmed. As the Ninth Circuit emphasized, the State public health officials who were designing the Blueprint considered eight

[13] Following the Ninth Circuit's opinion in South Bay, the Ninth Circuit decided *Harvest Rock Church v. Newsom*, which followed *South Bay*. 2021 WL 235640, at *1 (9th Cir. 2021).

objective risk criteria related to the spread of COVID-19: (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing. Kurtz Decl. ¶ 20.

Here, Plaintiffs propose private gatherings. Applying these objective factors, private gatherings are very risky for the spread of COVID-19. All eight of these factors show that private gatherings greatly risk the spread of COVID-19. At private gatherings, people often do not use face coverings (Factor 1). Nor do people maintain physical distancing (Factor 2) or limit the number of people per square foot (Factor 3). The time spent in close proximity to others is longer than in public settings (Factor 4), allowing a sufficient dose of viral droplets or particles to move from one person to others. Watt Decl. ¶¶ 42–44; Rutherford Decl. ¶¶ 60, 76–77; Cody Decl. ¶¶ 34–35. People from different households mix (Factor 5) and physically interact (Factor 6). Ventilation is limited indoors (Factor 7). Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Activities such as shouting can be involved, especially in gatherings like the political rallies that Tandon wishes to hold (Factor 8). Even where face coverings and strict physical distancing are used, indoor gatherings involve six of the other eight factors that correspond to a higher risk of spreading COVID-19, and outdoor gatherings involve five of the other eight factors. Thus, as the vast consensus of public health experts believes, gatherings must be limited in order to slow the spread of COVID-19. Rutherford Decl. ¶ 50; Stoto Decl. ¶ 15; Watt Decl. ¶¶ 51–52; Reingold Decl. ¶ 27; Cody Decl. ¶ 75; Maldonado Decl. ¶¶ 13, 18.

Second, as discussed above, the Court's independent review of the State's and the

County's private gatherings restrictions confirms that the restrictions are narrowly tailored for three reasons: (1) they limit attendance at gatherings; (2) they place stricter limits on indoor gatherings than outdoor gatherings; and (3) the State's restrictions place stricter limits on gatherings in counties where COVID-19 is more prevalent. *See* Section III-B-3-b-iii-(d), *supra*.

Finally, Plaintiffs' two less restrictive alternatives are insufficient to reduce community spread, protect high risk individuals, and prevent the healthcare system from being overwhelmed. Plaintiffs first propose focusing on vulnerable populations, but the Court has already explained why that would be insufficient to meet the compelling government interests at stake. *See* Section III-B-2-d, *supra*. Plaintiffs also propose indoor gatherings with face coverings and physical distancing. However, as the Court explained more fully in Section III-B-3-b-i, *supra*, even when people wear face coverings and physically distance, a significant risk of infection remains, particularly when people get together for extended periods and in environments with limited ventilation, such as indoors. Watt Decl. ¶¶ 38, 45–46, 48; Rutherford Decl. ¶¶ 60, 76–77, 84.

Moreover, the State's and County's experience bears out the importance of not only wearing a face covering and social distancing but also limiting gatherings. At least 23 of 30 California counties experiencing increases in their COVID-19 cases identified gatherings as a cause of the rise in cases. Watt Decl. ¶ 41. By contrast, when the State has put restrictions on private gatherings into place, there has been a decrease in cases. *Id*. ¶¶ 62, 93. The County has also seen a decrease in cases when gatherings have been restricted. Cody Decl. ¶ 19. Accordingly, the State's and County's restrictions are the least restrictive alternative that will reduce community spread, protect high risk individuals, and prevent the healthcare system from being overwhelmed.

Three recent United States Supreme Court and the Ninth Circuit decisions did not address the restrictions at issue in the instant motion. Instead, those decisions struck down the imposition, without consideration of capacity limits, of small attendance limits on large houses of worship. By contrast, Plaintiffs in the instant case do not challenge restrictions on houses of worship. *See* Tr. of

Dec. 17, 2020 Hearing at 21:15–19, ECF No. 60 (The Court: "Are any of these plaintiffs houses of worship, or alleging restrictions on houses of worship? It seems like it's more focused on private gatherings that have religious purposes, like Bible studies in the home." Plaintiffs' Counsel: "I think that's right, Your Honor."). Instead of restrictions on houses of worship, Plaintiffs challenge restrictions on private gatherings, including gatherings at private homes. Private homes are significantly smaller and less ventilated spaces than the large houses of worship at issue in those three cases, which the Court now addresses.

In *Roman Catholic Diocese v. Cuomo*, the United States Supreme Court analyzed whether New York's COVID-related restrictions on houses of worship violated the free exercise of religion. 141 S. Ct. at 66. The restrictions at issue used a color-coded tiered system to assess coronavirus risk and limited attendance at services to 10 people in "red" zones and 25 people in "orange" zones. *Id*. Yet in the same zones, "essential businesses" such as acupuncture facilities, campgrounds, and garages "could admit as many people as they wished." *Id*. Because the New York restrictions "single[d] out houses of worship for especially harsh treatment," the United States Supreme Court concluded that the restrictions were not neutral and generally applicable. *Id.* (quoting *Lukumi*, 508 U.S. at 133).[14] Furthermore, because the New York restrictions imposed limits on worship services that were not tethered to the capacity of the houses of worship, the United States Supreme Court concluded that the New York restrictions were not narrowly tailored. *Id*. at 67.

Subsequently, in *Dayton Valley*, the Ninth Circuit considered a Nevada directive that prohibited attendance of more than 50 people at indoor worship services, but permitted casinos,

[14] Furthermore, in *Roman Catholic Diocese*, the record included "statements made in connection with the challenged rules, [which could] be viewed as targeting the 'ultra-Orthodox [Jewish] community.'" 141 S. Ct. at 66. By contrast, here, Plaintiffs have not pointed to any evidence that the State enacted its generally applicable private gatherings restrictions in order to target religious groups.

bowling alleys, retail businesses, restaurants, and arcades to operate at 50 percent of their fire-code capacity. 982 F.3d at 1230. Because the Nevada directive "treat[ed] numerous secular activities and entities significantly better than religious worship services," the Ninth Circuit concluded that the directive was not neutral and generally applicable. *Id.* at 1233. The Ninth Circuit also held that the 50-person attendance limit on all houses of worship was not narrowly tailored because Nevada had not tied attendance limits to the size of the house of worship. *Dayton Valley*, 982 F.3d at 1234.

Similarly, in *South Bay*, the Ninth Circuit considered the Blueprint's restrictions on houses of worship, which are not at issue in the instant case. At the widespread tier, houses of worship in counties in the widespread tier can only hold religious services outdoors, but commercial entities such as grocery stores and retail stores can operate indoors. *Id.* at *9. Because there were "different capacity restrictions on religious services relative to non-religious activities and services," the Ninth Circuit held that the Blueprint's restrictions on houses of worship were not neutral and generally applicable. *Id.* at *9–*10. The Ninth Circuit later enjoined the Blueprint's 100 and 200 person attendance limits on houses of worship in the substantial and moderate tiers because these limits were not tied to the size of the house of worship. 2021 WL 222814, at *17–*18.

The restrictions at issue here, which prohibit private gatherings, are distinguishable from the restrictions at issue in those cases, which restricted services at houses of worship. Indeed, the Gannons seek to hold gatherings at their private home, which is a significantly smaller space than the large houses of worship at issue in *Roman Catholic Diocese*, *Dayton Valley*, and *South Bay*, and thus more likely to lead to the spread of COVID-19. Watt Decl. ¶ 42. In a smaller space, attendees are likely to be in higher density and more proximity to one another. "[T]he closer the proximity between individuals who gather, and the longer they are in close proximity, the more opportunity there is for the virus to be transmitted via droplets or aerosolized particles containing the virus." Rutherford Decl. ¶ 74. Moreover, smaller spaces have more limited ventilation, which

increases the likelihood that COVID-19 will spread. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. In addition, at private gatherings, it is "uncertain whether participants in these gatherings would maintain social distancing and face coverings during the entirety of the gatherings." Rutherford Decl. ¶ 84. *See supra* Section III-B-3-b-i (analyzing private gatherings in more detail).

The County's private gatherings restrictions are also distinguishable from the restrictions at issue in *Roman Catholic Diocese*, *South Bay*, and *Dayton Valley*. Unlike the large houses of worship in those cases, Tandon has not shown that the County's private gathering restrictions[15] are disproportionate to the space in which he plans to hold gatherings.

In sum, the Court concludes that the State's and the County's private gatherings restrictions are content neutral and satisfy intermediate scrutiny. In the alternative, even assuming that the State's and the County's private gatherings restrictions are not content neutral, these restrictions nonetheless satisfy strict scrutiny because they are narrowly tailored to reduce community spread, protect high risk individuals, and prevent the healthcare system from being overwhelmed. Thus, Plaintiffs have not shown that they are likely to succeed on their free speech and assembly claims.

4. Plaintiffs are not likely to succeed on the merits of their free exercise and assembly claims.

Plaintiffs Wong and Busch argue that the State's private gatherings restrictions violate their First and Fourteenth Amendment rights to free exercise and assembly by preventing them from holding Bible studies at their homes.[16] As discussed above, the State's private gatherings

---

[15] As discussed in footnote 7 *supra*, after Plaintiffs filed the instant motion, the County released an updated Mandatory Directive for Gatherings that prohibited indoor gatherings and permitted only outdoor gatherings of up to 200 people.

[16] On January 29, 2021, another court in this district enjoined: (1) the Blueprint's 100 and 200 person limits on services at houses of worship in the substantial and moderate tiers, and (2) the

restrictions prohibit indoor gatherings and limit outdoor gatherings to three households or fewer. *See* Section III-A, *supra*. The Court notes that the State does not limit the number of attendees at any outdoor house of worship service.

As a general matter, "[t]he Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment . . . provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*[.]'" *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876–77 (1990) (quoting U.S. Const., amend. I). To determine whether a law prohibits the free exercise of religion, courts must first determine whether the law "is neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "[A] law that is neutral and of general applicability" must only pass rational basis review, meaning that it "need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* By contrast, a law that is not neutral and generally applicable must survive strict scrutiny, meaning that it "must be justified by a compelling government interest and must be narrowly tailored to advance that interest." *Id.* at 531–32.

Below, the Court concludes that the State's private gatherings restrictions are (1) neutral and generally applicable; and (2) rationally related to a legitimate government interest. Moreover, the Court finds that even assuming the restrictions are not neutral and generally applicable, they would satisfy strict scrutiny.

a. The State's private gatherings restrictions are neutral and generally applicable.

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation. " *Lukumi*, 508 U.S. at 533. "A law lacks facial neutrality if it refers

---

State's restrictions on other activities within houses of worship, such as a parishioner interacting with clergy. *See Gateway City Church v. Newsom*, 2021 WL 308606, at *16–*17 (N.D. Cal. Jan. 29, 2021). As explained above, the instant motion does not raise any restrictions regarding houses of worship. *See* Section III-A, *supra*.

to a religious practice without a secular meaning discernable from the language or context." *Id*. Therefore, where laws "make no reference to any religious practice, conduct, belief, or motivation, they are facially neutral." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015).

A law is not generally applicable if it, "in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Accordingly, "[a] law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans*, 734 F.3d at 1079 (citing *Lukumi*, 508 U.S. at 542–46). "Neutrality 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.

As explained above, for counties in the widespread tier, the State's private gatherings restrictions prohibit all indoor gatherings and limit outdoor gatherings to three households. Haddad Decl. Exh. 12; Dunn Reply Decl. Exh. 4. The State's private gatherings restrictions define gatherings as "social situations that bring together people from different households at the same time in a single space or place." *Id*.

The State's private gatherings restrictions are neutral for two reasons. For one, the State's object is not to restrict religious gatherings because they are religious in nature, but because they are gatherings. *Lukumi*, 508 U.S. at 523. For another, the State's restrictions "make no reference to any religious practice, conduct, belief, or motivation." *Stormans*, 794 F.3d at 1076.

The State's private gatherings restrictions are also generally applicable. The State's private gatherings restrictions apply to *all* gatherings, whether religious or secular. *Lukumi*, 508 U.S. at 543. Thus, the State's private gatherings restrictions are neutral and generally applicable.

Resisting this conclusion, Plaintiffs rely on the same body of case law, already described by the Court above, *supra* Section III-B-3-b-iii, which held that certain COVID-related restrictions on *houses of worship* were neither neutral nor generally applicable. *See Roman Catholic Diocese*,

141 S. Ct. at 67; *South Bay*, 2021 WL 222814, at *8; *Dayton Valley*, 982 F.3d at 1233. Those cases are inapposite. They addressed restrictions that singled out houses of worship and treated them less favorably than secular entities. By contrast, the State's private gatherings restrictions treat religious and secular gatherings alike and make no reference to religion. Haddad Decl. Exh. 12; Dunn Reply Decl. Exh. 4.

At least one court of appeals panel has distinguished *Roman Catholic Diocese* on similar grounds. In *Commonwealth* ex rel. *Danville Christian Academy v. Beshear*, religious schools brought a Free Exercise Clause challenge to a Kentucky order prohibiting in person instruction at all public and private schools, religious or not. 981 F.3d 505, 507 (6th Cir. 2020), *injunction denied without prejudice*,[17] 141 S. Ct. 527 (2020).[18] The district court granted a preliminary injunction, but the Sixth Circuit granted a stay of the preliminary injunction and concluded that the plaintiffs were unlikely to succeed on the merits of their Free Exercise claim. *Id*. The Sixth Circuit emphasized that the order "applies to all public and private elementary and secondary schools in

[17] On December 17, 2020, the United States Supreme Court declined to enjoin the Sixth Circuit's decision in *Beshear*. 141 S. Ct. 527 (2020). The United States Supreme Court noted that Kentucky students would be going on holiday break starting the following day, December 18, 2020, and school would not resume until January 4, 2020. *Id*. The United States Supreme Court stated that "[u]nder all the circumstances, especially the timing and the impending expiration of the Order, we deny the application without prejudice to the applicants or other parties seeking a new preliminary injunction if the Governor issues a school-closing order that applies in the new year." *Id*.

[18] Following the Sixth Circuit's decision in *Beshear*, another panel of the Sixth Circuit concluded that an Ohio county's order prohibiting instruction in schools, including religious schools, was not neutral and generally applicable. *See Monclova Christian Academy, et al. v. Toledo-Lucas County Health Department*, --- F.3d ----, 2020 WL 7778170, at *2–*4 (6th Cir. 2020). *Monclova* reached that conclusion by comparing schools to other comparable secular actors, an analysis that *Beshear* did not engage in. *Id*. at *3–*4. The *Monclova* panel justified its analysis in part by citing to Justice Gorsuch's dissent from the United States Supreme Court's decision not to grant injunctive relief. *Id*. at *2.

the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability and need not be justified by a compelling government interest." *Id.* at 509. The Sixth Circuit distinguished *Roman Catholic Diocese* because the restrictions at issue in that case "appl[ied] specifically to houses of worship." *Id.*[19] Furthermore, "the order at issue in *Roman Catholic Diocese* treated schools, factories, liquor stores, and bicycle repair shops, to name only a few, 'less harshly' than houses of worship." *Id*. This same reasoning applies to the State's private gatherings restrictions. Like Kentucky's restrictions on schools, which incidentally burdened religious schools, the State's private gatherings restrictions incidentally burden the religious gatherings that Plaintiffs seek to hold. In sum, recent case law only underscores that the State's private gatherings restrictions—unlike restrictions invalidated elsewhere—are neutral and generally applicable.

With little case law to support them, Plaintiffs last argue that their in-home gatherings are being treated more harshly than other activities, such as filming, going to laundromats, and visiting hotels. Mot. at 20; Reply at 14. Plaintiffs specifically assert that some filming can take place in a home even where Bible studies are banned. Reply at 14. Plaintiffs contend that these exempted activities inflict identical or increased health risks. Mot. at 20. Thus, Plaintiffs argue that the Blueprint is underinclusive, treating comparable secular activities more favorably.

However, to determine whether a restriction is underinclusive, courts must compare religious conduct with "analogous non-religious conduct." *Lukumi*, 508 U.S. at 546. As explained above, the Court concludes that private gatherings are distinct from, and more likely to spread COVID-19 than, socially distanced commercial activities. *See* Section III-B-3-b-i, *supra*.

---

[19] Conversely, following the United States Supreme Court's decision in *Roman Catholic Diocese*, the Second Circuit concluded that New York's restrictions were not neutral because they "explicitly impos[ed] on 'houses of worship' restrictions inapplicable to secular activities." *Agudath Israel of America v. Cuomo*, --- F.3d ---, 2020 WL 7691715, at *7 (2d. Cir. 2020). The State's restrictions at issue here do not explicitly impose restrictions on religious gatherings that are not imposed on secular gatherings—rather, all gatherings are subject to the same restrictions.

Recognizing the unique dangers of gatherings, the State has treated all gatherings, religious and non-religious, alike. Haddad Decl., Exh. 12. The fact that the State treats dissimilar activities differently is of no import. Because the State treats all gatherings, religious and secular, the same, the State's private gatherings restrictions are neutral and generally applicable.

b. The State's private gatherings restrictions are rationally related to a legitimate government interest.

Because the State's private gatherings restrictions are neutral and generally applicable, they need only satisfy rational basis review. *Lukumi*, 508 U.S. at 531. Under rational basis review, courts must uphold laws "if they are rationally related to a legitimate government purpose." *Stormans*, 794 F.3d at 1084. As explained above, the Court has already found that the State's private gatherings restrictions are rationally related to a legitimate government interest. *See* Section III-B-2, *supra*.

c. The State's private gatherings restrictions are narrowly tailored to achieve a compelling government interest

In the alternative, even assuming the State's private gatherings restrictions are not neutral and generally applicable, they still are narrowly tailored to achieve the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from illness, and preventing the overwhelming of the healthcare system. The Court has already found that the State's private gatherings restrictions are narrowly tailored to achieve these compelling government interests. *See* Section III-B-3-b-iii, *supra*. Accordingly, Plaintiffs have not shown that they are likely to succeed on the merits of their free exercise claims.

C. Only some Plaintiffs are likely to suffer irreparable harm in the absence of an injunction.

For the Court to grant a preliminary injunction, a plaintiff must show that she is likely to suffer irreparable harm in the absence of an injunction. *Winter*, 555 U.S. at 20. "[I]rreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Az. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017).

The Court discusses Plaintiffs' allegations of irreparable harm in three groups: (1) Plaintiffs who claim monetary injury; (2) Plaintiffs who have been or are under threat of being driven out of business; and (3) Plaintiffs who suffer loss of political and religious freedoms.

First, Plaintiffs Khanna, Beaudet, and Evarkiou are business owners who claim monetary injury. *See* Khanna Decl. ¶ 7 (stating that the State and the County orders have led to a loss of revenue and profits for Khanna's winery business); Beaudet Decl. ¶ 3 (stating that Beaudet's restaurant has suffered significant losses); Evarkiou Decl. ¶ 5 (stating that Evarkiou's salon has lost revenue). Monetary injury alone is insufficient to show irreparable harm. *Az. Dream Act Coal.*, 855 F.3d at 978. Thus, Plaintiffs Khanna, Beaudet, and Evarkiou have not shown that they are likely to suffer irreparable harm in the absence of an injunction.

Second, Richards, the gym owner, and Mansour, the facial bar owner, claim that they have been or will be driven out of business. Richards Reply Decl. ¶ 4 (stating that she has been driven out of business by COVID-related restrictions); Mansour Decl. ¶ 7 (stating that "it is unclear whether [her] business will ever recover from [the restrictions]"). The Ninth Circuit has concluded that "[t]he threat of being driven out of business is sufficient to establish irreparable harm.'" *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019) (quoting *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985)). Accordingly, Plaintiffs Richards and Mansour have shown that they are likely to suffer irreparable harm.

Finally, Plaintiffs Tandon, the Gannons, Busch, and Wong claim loss of their political and religious freedoms under the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, courts have held that plaintiffs challenging COVID-related restrictions on religious freedoms are likely to suffer irreparable harm in the absence of an injunction. *See Roman Catholic Diocese*, 141 S. Ct. at 67–68 (concluding that, in the absence of injunctive relief, New York's COVID-19 related restrictions on houses of worship would cause

irreparable harm); *South Bay*, 2021WL 222814, at *16 ("We agree that South Bay is suffering irreparable harm by not being able to hold worship services in the Pentecostal model to which it subscribes."); *Dayton Valley*, 982 F.3d at 1234 (holding that Nevada's restrictions on houses of worship would cause irreparable harm). Because Plaintiffs Tandon, the Gannons, Busch, and Wong claim loss of their political and religious freedoms, they have shown that they are likely to suffer irreparable harm in the absence of an injunction.

D. An injunction would not be in the public interest.

The final preliminary injunction factor requires that plaintiffs show that the balance of equities tips in their favor and that an injunction would advance the public interest. *Winter*, 555 U.S. at 20. The balance of equities factor focuses on "the effect of each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. By contrast, "[t]he 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, 756 (9th Cir. 2014) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)). When the government is a party, the analysis of these two factors merges. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Thus, the Court must consider what "public consequences" would result from issuing an injunction. *See Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Here, an injunction would not be in the public interest. In reaching this conclusion, the Court covers well-trodden ground. In *South Bay*, the Ninth Circuit affirmed a district court's conclusion that enjoining the Blueprint's restrictions on houses of worship in the widespread tier would not be in the public interest. *See South Bay*, 2021 WL 222814, at *16–*17. The Ninth Circuit explained that if an injunction were granted, "the public will be further endangered by both the virus and the collapse of the state's health system." *Id.* at *17. The Ninth Circuit stated that "it is difficult to see how allowing more people to congregate indoors will do anything other than lead

to more cases, more deaths, and more strains on California's already overburdened healthcare system." *Id*.

The Court agrees. The Court has concluded that the State's and County's restrictions, including the State's and the County's private gatherings restrictions, the County's Personal Care Services Directive, and the County's Mandatory Directive for Outdoor Dining, are carefully designed to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of the healthcare system. *See* Section III-B-1-a, *supra*. If the Court overrode the State's and County's public health officials and enjoined these restrictions, then more deaths, more serious illnesses, and more strain on California's already overburdened healthcare system would result. The Court discusses each harm in turn.

First, if the Court enjoined the State's and County's restrictions, some people in the State and the County would be at increased risk of dying from COVID-19. As of February 3, 2021, COVID-19 has killed over 445,000 people in the United States. The disease has not spared the young or the old. Twenty percent of those who have died of COVID-19 in the United States have been younger than 65 years old, and nearly two thousand people who have died of COVID-19 were younger than 30 years old as of February 3, 2021. Lipsitch Decl. ¶ 28; Rutherford Decl. ¶ 97; *CDC COVID Data Tracker*. In total, the United States is projected to face a death toll as high as the number of Americans that were killed in battle in World War II. Rutherford Decl. ¶ 26.

Second, if the Court enjoined the State's and County's restrictions, some people in the State and the County would be at increased risk of serious illness from COVID-19. COVID-19 can cause pneumonia, respiratory failure, other organ failure, cardiovascular events, strokes, and seizures. Rutherford Decl. ¶ 21; Watt Decl. ¶ 22; Reingold Decl. ¶ 14. Although the risk of severe illness from COVID-19 increases steadily with age, many younger people have become seriously ill from COVID-19. Watt Decl. ¶ 22; Reingold Decl. ¶ 15. For example, the National Collegiate Athletic Association found that college football players who had recovered from asymptomatic or

mildly symptomatic COVID-19 infections had a high rate of myocarditis, which can lead to cardiac arrest with exertion. Rutherford Decl. ¶ 25. People of any age with certain underlying conditions and pregnant women are at increased risk of severe illness from COVID-19. *Id.*; Rutherford Decl. ¶ 99. Approximately six in ten Americans have been diagnosed with a chronic medical condition, and four in ten have been diagnosed with more than one of these conditions. Reingold Decl. ¶ 17. The conditions are more common in, and the related burden of COVID-19 deaths is likely to fall on, communities of color and low-income communities. Lipsitch Decl. ¶ 28; Garcia Decl. ¶¶ 9–15.

Third, if the Court enjoined the State's and County's restrictions, the strain on California's already overburdened healthcare system would increase further. Even one of Plaintiffs' experts, Dr. Bhattacharya, concedes that restrictions might be justified "where hospital overcrowding is predicted to occur" because overcrowding and "the unavailability of sufficient medical personnel" "might induce avoidable mortality." Bhattacharya Reply Decl. ¶ 15. In their briefs, Plaintiffs concede that the State can act to permit the healthcare system from being overwhelmed. *See* Mot. at 1 ("Governor Newsom was correct to focus on the risk that hospitals would be overrun"), 15 (acknowledging "the compelling interest in preventing hospitalizations and deaths resulting from COVID-19").

Plaintiffs and Plaintiffs' experts relied on the now obsolete premise that California hospitals never reached their capacities. Mot. at 1, 9; Reply at 20; Bhattacharya Decl. ¶ 21; Bhatia Decl. ¶ 32, Bhattacharya Reply Decl. ¶¶ 13–17; Bhatia Reply Decl. ¶ 31. Since Plaintiffs' motion and declarations were submitted, the virus has surged in California, and California's hospitals have been overburdened. At times, the State and various counties, including Santa Clara County, have had 0 percent remaining ICU capacity. *See About COVID-19 Restrictions*, California For All, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed January 19, 2021); COVID-19 Hospitalizations Dashboard, County of Santa Clara Emergency Operations Center,

available at https://www.sccgov.org/sites/covid19/Pages/dashboard-hospitals.aspx. As the Ninth Circuit explained on January 22, 2021, "paramedics in Los Angeles have been instructed to conserve oxygen in treating patients and not to bring patients to the hospital who have little chance of survival." *South Bay*, 2021 WL 222814, at *4. Accordingly, the State's and County's restrictions will prevent overwhelming the healthcare system.

In response, Plaintiffs make two arguments as to why an injunction would still be in the public interest. Neither carries the day. First, Plaintiffs argue that an injunction is necessary to halt violations of their constitutional rights. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). However, the Court above has found that Plaintiffs' constitutional rights have not been violated. Moreover, religious worship is widely available to Plaintiffs at houses of worship. Specifically, the State permits houses of worship to hold outdoor worship services with no attendance limits in the widespread tier. *South Bay*, 2021 WL 222814, at *16–*17. Outdoor gatherings and worship services are particularly viable in year-round warm climates like California's. *See id.* ("Given the obvious climatic differences between San Diego in the winter and say, New York, the . . . allowance for outdoor services is much more than 'lip service' to the demands of the First Amendment."). In addition, even in the widespread tier, there are no limits on indoor activities "other than worship services" at houses of worship. *Gateway City Church*, 2021 WL 308606, at *16–*17 (N.D. Cal. Jan. 29, 2021).[20] For example, individual parishioners are permitted to interact with clergy inside houses of worship. *Id.* at *14.

[20] *Gateway City Church* enjoined "the Blueprint's restrictions on activities at places of worship *other than worship services*." *Gateway City Church*, 2021 WL 308606, at *17 (emphasis added). As the *Gateway City Church* Court explained, activities other than worship services do not involve "people of separate households gathering in close proximity for extended periods of time." *Id.* at *14. Rather, these activities involve individual parishioners from different households—or multiple members of the same household—interacting with clergy in a way that "likely involve[s] no more risk than certain personal care services." *Id.*

As for the lower three tiers, indoor worship services are permitted at houses of worship. Specifically, houses of worship can hold indoor worship services at 25 percent capacity in the substantial tier and 50 percent capacity in the moderate and minimal tiers. *South Bay*, 2021 WL 222814, at *16–*17.

Plaintiffs also can hold small gatherings at their homes. In the widespread tier, Plaintiffs can hold outdoor gatherings including up to three households. Haddad Decl. Exh. 12. In the substantial, moderate, and minimal tiers, Plaintiffs can hold indoor gatherings of up to three households. *Id*. As a political candidate, Tandon can hold even outdoor gatherings of up to 200 people even in the widespread tier. Bussey Decl. Exhs. A, G.

Second, Plaintiffs argue that an injunction would prevent other harms associated with COVID-related restrictions, including mental health issues, substance abuse, hunger, and negative impacts on children's development. Bhattacharya Reply Decl. ¶ 37–41; Bhatia Decl. ¶ 95. However, some of these harms are at least partially due to the pandemic itself. For example, even if the Court enjoined COVID-related restrictions, private individuals, businesses, and organizations might choose to continue their quarantines, such that people would continue to experience the harms referenced by Plaintiffs. In fact, Plaintiffs' expert emphasizes the extent to which many individuals have made self-quarantine decisions in parallel to the State's and County's restrictions. Bhatia Reply Decl. ¶¶ 60, 62–63. In addition, if the Court enjoined the restrictions, the pandemic will worsen, serious illnesses and death would increase, which could further exacerbate the issues to which Plaintiffs point.

Given the unique risks of gatherings in spreading COVID-19; the deaths and serious illnesses that result from COVID-19; and the overwhelming strain on the healthcare system, the Court finds that enjoining the State's and County's restrictions on Plaintiffs' gatherings and on Plaintiffs' businesses would not be in the public interest. Therefore, Plaintiffs have not carried their burden of demonstrating that an injunction is in the public interest.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

Dated: February 5, 2021

Lucy H. Koh

LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RITESH TANDON, ET AL.,	)	C-20-07108 LHK
	)	
PLAINTIFFS,	)	SAN JOSE, CALIFORNIA
	)	
VS.	)	DECEMBER 17, 2020
	)	
GAVIN NEWSOM, ET AL.,	)	PAGES 1-48
	)	
DEFENDANTS.	)	
_____	)	

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: EIMER STAHL, LLP
BY: ROBERT E. DUNN
99 SOUTH ALMADEN BOULEVARD, SUITE 662
SAN JOSE, CALIFORNIA 95113

FOR THE STATE DEFENDANTS: OFFICE OF THE ATTORNEY GENERAL
BY: LARA HADDAD
300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CALIFORNIA 90013

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

APPEARANCES (CONTINUED)

FOR THE COUNTY DEFENDANTS:	OFFICE OF THE COUNTY COUNSEL BY: JASON M. BUSSEY 70 WEST HEDDING STREET EAST WING, NINTH FLOOR SAN JOSE, CALIFORNIA 95110

SAN JOSE, CALIFORNIA DECEMBER 17, 2020

P R O C E E D I N G S

(ZOOM PROCEEDINGS CONVENED AT 2:42 P.M.)

THE COURT: ALL RIGHT. THEN MS. DIBBLE, IF YOU WOULD PLEASE GO AHEAD AND CALL THE CASE. THANK YOU.

THE CLERK: YES, YOUR HONOR.

CALLING CASE 20-7108, TANDON, ET AL., VERSUS NEWSOM, ET AL.

COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD, STARTING WITH COUNSEL FOR THE PLAINTIFF. THANK YOU.

MR. DUNN: ROBERT DUNN FOR PLAINTIFFS.

MS. HADDAD: THIS IS LARA HADDAD FOR THE STATE DEFENDANTS.

MR. BUSSEY: JASON BUSSEY FOR THE COUNTY DEFENDANTS.

AND I'LL ADD THAT MY COLLEAGUE, ROBIN WALL, WHO WAS INITIALLY GOING TO MAKE AN APPEARANCE, WAS UNABLE TO IN LIGHT OF THE TIMING CHANGE. HE HAS A 2:30 APPEARANCE BEFORE JUDGE FREEMAN, SO IT WILL JUST BE ME.

THE COURT: OKAY. ALL RIGHT. WELL, THANK YOU FOR THE FLEXIBILITY WITH THE TIMING CHANGE.

OKAY. THEN LET'S GO AHEAD, PLEASE. I HAVE A NUMBER OF QUESTIONS, AND IF YOU COULD PLEASE KEEP YOUR ANSWERS BRIEF, WE CAN GET THROUGH ALL OF THEM, AND THESE ARE REALLY JUST TO HELP IN FIGURING OUT EXACTLY WHAT THE COURT HAS TO DECIDE AND HELP IN MAKING THOSE DECISIONS WITH ALL THE DIFFERENT ISSUES YOU'VE

RAISED.

SO MY FIRST QUESTION IS FOR BOTH SIDES, AND THAT IS WHETHER THE RECENT STAY AT HOME ORDER SUPERSEDES THE BLUEPRINT AS TO WHAT GATHERINGS ARE PERMITTED. DO BOTH SIDES AGREE ON THAT?

MS. HADDAD: YES, YOUR HONOR. I THINK -- THE STATE DEFENDANTS' POSITION IS THAT THE BLUEPRINT IS -- THE STAY AT HOME ORDER IS CURRENTLY IN EFFECT FOR SANTA CLARA COUNTY.

MR. DUNN: YES, THAT'S OUR UNDERSTANDING TOO, YOUR HONOR.

THE COURT: OKAY. SO THEN ARE THE PLAINTIFFS CHALLENGING THE STAY AT HOME ORDER, OR ARE YOU --

THE REPORTER: YOUR HONOR, YOU CUT OUT.

THE COURT: SORRY, I'M NOT SURE HOW THAT HAPPENED.

ARE THE PLAINTIFFS CHALLENGING THE STAY AT HOME ORDER OR THE BLUEPRINT, OR BOTH?

MR. DUNN: YOUR HONOR, THE CHALLENGE THAT WE'VE ASSERTED IN THE COMPLAINT IS TO THE BLUEPRINT SPECIFICALLY AND THE COUNTY GUIDELINES AS THEY EXISTED AT THE TIME.

WE HAVE NOT CURRENTLY ASSERTED AND CHALLENGED THE REGULATION OF THE STAY AT HOME ORDER. WE THINK THERE ARE ASPECTS OF THE STAY AT HOME ORDER THAT REMAIN PROBLEMATIC.

BUT IT'S OUR POSITION THAT YOU COULD RULE ON THE BLUEPRINT -- WHICH WE UNDERSTAND WILL SNAP BACK INTO PLACE WHEN THE STAY AT HOME ORDER EXPIRES -- THAT YOU COULD RULE ON THAT

WITHOUT TOUCHING THE SHELTER IN PLACE ORDER IF YOU'RE INCLINED TO DO SO.

THE COURT: LET ME ASK MS. HADDAD, DO YOU THINK THE CHALLENGE TO THE BLUEPRINT IS MOOTED NOW THAT WE'RE IN THE SORT OF STAY AT HOME UNIVERSE FOR THE IMMEDIATELY FORESEEABLE FUTURE?

MS. HADDAD: YES, YOUR HONOR. I THINK -- I MEAN, THE REGIONAL STAY AT HOME ORDER IS THE OPERATIVE -- IT IS THE OPERATIVE RULES AND THERE ARE SEVERAL -- THERE ARE SEVERAL CHANGES THAT DO AFFECT PLAINTIFFS' CLAIM -- THAT AFFECT DIRECTLY -- THAT DIRECTLY AFFECT PLAINTIFFS' CLAIMS.

THE COURT: SO WHAT DO YOU PROPOSE, THAT WE JUST FIND THE CHALLENGE TO THE BLUEPRINT MOOT AND THEN JUST FOCUS ON THE STAY AT HOME ORDER?

MS. HADDAD: I THINK WE WOULD WANT -- WE WOULD WANT A CHANCE TO BRIEF THE STAY AT HOME ORDER. IT DID JUST GO INTO EFFECT I BELIEVE YESTERDAY OR THE DAY BEFORE.

THE COURT: UM-HUM.

MS. HADDAD: SO IF YOU -- IF YOU FIND IT MOOT, WE WOULD REQUEST A CHANCE TO BRIEF THAT.

THE COURT: ALL RIGHT. WELL, WHAT'S YOUR REQUEST? YOU ARE -- DO YOU WANT THE COURT TO FIND IT MOOT, OR NOT?

MS. HADDAD: I -- YES, YOUR HONOR, IN THIS CASE I THINK WE'D WANT THE COURT TO FIND IT MOOT.

THE COURT: OKAY.

LET ME HEAR FROM MR. DUNN. WOULD YOU WANT TO BRIEF THE STAY AT HOME ORDER? YOU SLIGHTLY KIND OF TOUCHED ON IT IN YOUR REPLY, BUT PROBABLY NOT SORT OF THE HEAD-ON RESPONSE THAT YOU MAY WANT, ESPECIALLY AS THAT IS WHAT THE DEFENDANT WANTS.

MR. DUNN: YOUR HONOR, I THINK OUR PREFERENCE IN THIS CASE WOULD BE TO NOT MOOT THE CHALLENGE TO THE BLUEPRINT.

AS WE NOTED, THE BLUEPRINT HASN'T BEEN RESCINDED IN ANY WAY, SHAPE, OR FORM. IT PRESUMABLY STILL WILL BE GOVERNING THROUGH THE WINTER, THROUGH THE SPRING, MAYBE INTO THE SUMMER. IT'S UNCLEAR. BUT THE BLUEPRINT HASN'T GONE ANYWHERE. IT'S JUST BEEN TEMPORARILY SUPERSEDED.

AND THIS SORT OF TOUCHES ON -- ONE OF THE TOUGH THINGS ABOUT THIS CASE IS THERE'S THIS EVER MOVING TARGET AND WE CAN'T PROBABLY GO THROUGH BRIEFING AND SCHEDULE HEARINGS EVERY TIME THE ORDER CHANGES.

SO I THINK OUR PREFERENCE IN THIS CASE, GIVEN THAT BOTH THE STATE AND THE COUNTY HAVE AT LEAST SET A DEADLINE ON THE SHELTER IN PLACE ORDER OF JANUARY 4, THAT WE WOULD DECIDE THE CHALLENGE BEFOREHAND, AND IF WE FIND IT NECESSARY TO CHALLENGE THE SHELTER IN PLACE, I THINK WE WOULD WANT ADDITIONAL BRIEFING AND MIGHT EVEN NEED TO BRING A NEW MOTION ON THAT.

MS. HADDAD: YOUR HONOR, JUST TO CLARIFY IT, THE REGIONAL STAY AT HOME ORDER IS REASSESSED ON JANUARY 4TH. IT DEPENDS ON ICU CAPACITY.

THE COURT: RIGHT. AND I SEE THAT IN SOUTHERN

CALIFORNIA, THERE ARE ZERO ICU BEDS. SOUTHERN CALIFORNIA IS AT 0 PERCENT CAPACITY; SAN JOAQUIN VALLEY IS AT 0.7 PERCENT CAPACITY; SANTA CLARA COUNTY, WHICH IS ALMOST 2 MILLION PEOPLE, WE HAVE 13 BEDS LEFT. I DON'T KNOW HOW THOSE ARE GOING TO BE ALLOCATED, AND WITH THE ANTICIPATION OF INCREASED NEED FOR HOSPITALIZATION BASED ON THE RISE OF CASES EVERY DAY, AND THEN MORE -- YOU KNOW, WE'RE JUST FEELING THE EFFECTS OF THANKSGIVING, WE'LL BE FEELING THE EFFECTS OF CHRISTMAS AND HANUKAH AND ALL THE HOLIDAYS, I SUSPECT THIS SURGE WILL BE CONTINUING AND THE CORRESPONDING HOSPITALIZATIONS WILL BE CONTINUING.

SO I -- I DON'T SEE THE BLUEPRINT GOING INTO EFFECT ON JANUARY 5TH. I MEAN, I THINK THE ESTIMATES ARE, IN FACT, THAT IT WILL NOT BE GOING INTO EFFECT ON JANUARY 5TH, AND FOR THE FORESEEABLE FUTURE WE'LL PROBABLY BE IN THIS STAY AT HOME REGIME.

MS. HADDAD: WE -- AND, YOUR HONOR, JUST TO EMPHASIZE THAT IT IS -- ALL OF THESE RESTRICTIONS ARE INTENDED TO BE TEMPORARY.

THE COURT: UNDERSTOOD.

MS. HADDAD: BUT, YES, IT IS -- GIVEN THE NUMBERS, AND CALIFORNIA'S RATES IN PARTICULAR, THE REGIONAL STAY AT HOME ORDER WILL LIKELY STAY IN EFFECT, ALTHOUGH I CAN'T SPEAK TO THAT. I DON'T --

THE COURT: SURE.

MS. HADDAD: YEAH.

THE COURT: OKAY. ALL RIGHT. WELL, LET ME GO AHEAD AND ASK THE REST OF MY QUESTIONS, AND THIS IS ALSO TO BOTH SIDES.

ARE THERE PARTICULAR PORTIONS OF ANY OF YOUR MEDICAL DECLARATIONS THAT YOU WANT THE COURT TO FOCUS ON? I MEAN, A LOT OF MEDICAL DECLARATIONS WERE SUBMITTED, SO IF YOU HAD ANY, LIKE, EITHER PARTICULAR PARAGRAPH OR SECTION OR TOPIC, IT WOULD BE HELPFUL IN JUST FOCUSSING THE COURT'S ATTENTION.

SO LET ME HEAR FROM BOTH SIDES. WHAT IS IT THAT YOU FIND WOULD BE MOST HELPFUL TO THE COURT IN DECIDING THIS MOTION?

MR. DUNN: SURE. I CAN START IT. THAT'S FINE.

THE COURT: PLEASE.

MR. DUNN: YEAH, I THINK THE TWO THINGS WE WOULD DRAW YOUR ATTENTION TO, YOUR HONOR, ARE, ONE, THE EVIDENCE SPECIFICALLY FROM DR. BHATTACHARYA ON THE PCR TESTING -- AND AGAIN, THIS IS NOT NECESSARILY RELEVANT TO THE SHELTER IN PLACE, WHICH IS BASED ON HOSPITALIZATIONS -- BUT TO THE EXTENT THE BLUEPRINT IS PREDICATED ON PCR TESTS, DR. BHATTACHARYA HAS PRESENTED EVIDENCE THAT ESSENTIALLY MANY OF THESE TESTS, BECAUSE OF THE WAY THEY ARE RUN, IN PARTICULAR THE CYCLE TIME, THRESHOLDS THAT THEY USE ARE CAPTURING ESSENTIALLY WHAT ARE FALSE POSITIVES, AND SO I THINK WE'LL HAVE A LARGE NUMBER OF CASES AND SORT OF POSITIVITY PERCENTAGE ESSENTIALLY BEING THROWN OFF BY THAT BECAUSE THESE LABORATORIES ARE RUNNING

EXTREMELY HIGH CYCLE TIMES.

AND I THINK HIS REPLY DECLARATION HAS MORE SPECIFIC DATA ON THAT THAT HE WAS ABLE TO LOCATE FROM THE ACTUAL LABS RUNNING THE TESTS.

BUT THAT GOES DIRECTLY TO THE RATIONALITY.

AND I THINK DR. BHATIA -- I DON'T HAVE PARAGRAPH NUMBERS ON THIS PARTICULAR THING -- BUT HE SPECIFIED THAT ONE OF THE MAJOR DEFECTS IN THE BLUEPRINT IS THAT THE STATE STILL HASN'T PROVIDED EVIDENCE LINKING THE SPECIFIC RESTRICTIONS TO HAZARDS.

SO, FOR EXAMPLE, THEY HAVEN'T YET BEEN ABLE TO EXPLAIN WHAT PERCENTAGE OF INFECTIONS ARE FROM RESTAURANTS OR FROM GYMS, YET THESE TYPES OF BUSINESSES ARE BEING HEAVILY RESTRICTED WITHOUT THAT EVIDENCE.

AS YOU MAY HAVE SEEN, SAN DIEGO COUNTY AND L.A. COUNTY, JUDGES IN SUPERIOR COURTS HAVE ISSUED INJUNCTIONS YESTERDAY AND LAST WEEK STRIKING DOWN BANS ON INDOOR AND OUTDOOR DINING FOR SPECIFICALLY THAT REASON, BECAUSE THE COUNTIES WERE GIVEN THE OPPORTUNITY TO PRESENT THAT EVIDENCE AND THEY DIDN'T, EITHER BECAUSE IT DOESN'T EXIST OR BECAUSE IT'S NOT STRONG ENOUGH AND THEY DIDN'T PUT IT FORWARD.

BUT DR. BHATIA HAS A SORT OF STRONG PRESENTATION ON THAT POINT.

SO THOSE ARE THE TWO THAT I WOULD HIGHLIGHT. THERE ARE OTHERS, BUT --

THE COURT: ALL RIGHT. THANK YOU. I APPRECIATE

THAT.

LET ME ASK YOU, WITH THE PCR TESTING, I UNDERSTAND THAT YOU MAY FEEL THAT THERE ARE OTHER TYPES OF TESTS THAT WOULD CAPTURE OTHER INFORMATION THAT MIGHT BE USEFUL, BUT WHAT IS IRRATIONAL ABOUT RELYING ON THAT?

MR. DUNN: YEAH, I THINK THE BEST WAY TO UNDERSTAND IT IS THAT THE STATE'S ASSERTED INTEREST IS IN MAINTAINING HOSPITAL CAPACITY, AND WE'VE SEEN THAT IN THE REGIONAL SHELTER IN PLACE ORDERS AS WELL.

AS BOTH OF OUR EXPERTS HAVE STATED, THAT'S A RATIONAL GOAL, TO PREVENT HOSPITALS FROM BEING OVERWHELMED SO WE DON'T END UP IN AN ITALY-LIKE SITUATION WHERE DOCTORS ARE ESSENTIALLY HAVING TO MAKE CHOICES AS TO WHO GETS TREATED AND WHO DOESN'T, WHO GETS WHEELED BACK OUT IN THE PARKING LOT.

THE POINT THAT BOTH DR. BHATTACHARYA AND DR. BHATIA HAVE MADE IS THAT THE PCR TEST ISN'T LINKED TO THAT PARTICULAR GOAL NEARLY AS DIRECTLY AS, YOU KNOW, AN EASILY AVAILABLE ALTERNATIVE, WHICH IS HOSPITALIZATION RATES, AND PARTICULARLY THE DIRECTION OF HOSPITALIZATION RATES.

SO THE STATE TRACKS VERY CLOSELY -- I TRACK IT EVERY DAY, I'M SURE PLAINTIFFS' COUNSEL TRACK IT EVERY DAY -- HOSPITALIZATIONS, YOU KNOW, ICU CAPACITY, YOU KNOW, SORT OF THE TREND IN HOSPITALIZATIONS.

AND THE POINT THAT THEY HAVE MADE IS NOT THAT THERE'S ANOTHER TEST THAT SHOULD BE USED, THEY AGREE PCR TESTS ARE SORT

OF THE GOLD STANDARD FOR DETERMINING WHETHER SOMEONE HAS BEEN INFECTED OR COME IN CONTACT WITH THE VIRUS.

BUT WHAT THEIR POINT IS IS WHAT EVEN THE CDC HAS RECOMMENDED USING IS SORT OF HOSPITALIZED, SYMPTOMATIC, YOU KNOW, OBSERVED CASES WHERE SOMEONE TESTS POSITIVE IN THE HOSPITAL WITH SYMPTOMS OF COVID-19, AND THAT WOULD BE THE -- SORT OF THE KEY BAROMETER FOR IMPOSING AND DECREASING RESTRICTIONS.

BUT INSTEAD, FOR SOME REASON THAT IS NOT YET CLEAR, THE STATE HAS DECIDED NOT TO USE HOSPITALIZATIONS AT ALL IN THE BLUEPRINT. IT ISN'T EVEN A FACTOR.

SO THAT'S -- THAT'S WHY -- BECAUSE THE PCR TEST HAS THAT LATENT DEFECT, THAT THEY RETURN FALSE POSITIVES, THEY NEED TO BE CORRELATED MORE DIRECTLY WITH HOSPITALIZATIONS, AND OUR VIEW IS THAT THAT'S EASY TO DO AND IT'S WHAT THE CDC HAS RECOMMENDED.

THE COURT: DO YOU CONCEDE THAT THE STATE'S INTEREST IN PREVENTING HOSPITALIZATIONS IS COMPELLING?

MR. DUNN: FROM PREVENTING HOSPITALS FROM BEING OVERBURDENED OR HAVING -- OVERSTRIPPING THEIR CAPACITY.

THE COURT: YOU AGREE THAT THAT IS A COMPELLING INTEREST?

MR. DUNN: YEAH, WE WOULD AGREE THAT'S A COMPELLING INTEREST.

THE COURT: OKAY. BUT THE INTEREST IN PREVENTING

INDIVIDUALS FROM REQUIRING HOSPITALIZATION IS NOT COMPELLING IN YOUR VIEW? OR IS?

MR. DUNN: I THINK WE WOULD SAY THAT THAT'S NOT A COMPELLING INTEREST.

THE COURT: WHAT KIND OF INTEREST IS THAT?

MR. DUNN: SOMETHING LESS THAN COMPELLING. YOU KNOW, IT'S A RATIONAL INTEREST, CERTAINLY. IT'S NOT -- IT'S NOT THAT THE STATE HAS NO INTEREST IN PROTECTING PEOPLE FROM EVER BEING HOSPITALIZED AND TREATED.

BUT I THINK ONCE YOU GO DOWN THAT ROAD, IF YOU SAID THAT THAT'S A COMPELLING INTEREST IS TO KEEP PEOPLE FROM GETTING SICK, THAT OPENS THE DOOR TO ALL SORTS OF RESTRICTIONS ALL THE TIME. THERE'S NOTHING SPECIAL ABOUT COVID-19. INFLUENZA SICKENS TENS OF THOUSANDS OF PEOPLE EVERY YEAR.

SO TO SAY THAT JUST TRYING TO KEEP PEOPLE OUT OF HOSPITALS JUSTIFIES THESE TYPES OF RESTRICTIONS I THINK IS KIND OF A PANDORA'S BOX.

THE COURT: WHAT ABOUT PREVENTING DEATHS? IS THAT A COMPELLING INTEREST OR THAT'S ONLY A RATIONAL INTEREST?

MR. DUNN: THAT'S CERTAINLY A COMPELLING INTEREST.

BUT THE STATE NEVER PURSUES THAT INTEREST, YOU KNOW, ESSENTIALLY IN ISOLATION OF ALL OTHER INTERESTS. THE STATE COULD DO ALL SORTS OF RESTRICTIONS TO PREVENT DEATH, BUT IT DOESN'T EVER TAKE IT TO THE EXTREME.

THE COURT: UH-HUH. SO LET ME ASK YOU, YOU MADE THE

COMPARISON TO INFLUENZA. AS OF TODAY, 308,000 AMERICANS HAVE DIED OF COVID; 58,000 DIED IN THE VIETNAM WAR; 37,000 DIED IN THE KOREAN WAR; 116,000 AMERICANS DIED IN WORLD WAR I.

SO WHAT DO YOU THINK ABOUT THAT COMPARISON IN DEATHS? AND I'M SURE THAT THE COVID DEATH NUMBER WILL BE INCREASING OVER THE NEXT -- AT LEAST THE NEXT MONTH, PERHAPS THE NEXT SEVERAL MONTHS AS WE SEE THE IMPACTS OF ALL OF THE HOLIDAYS IN ANY SURGE IN HOSPITALIZATIONS AND POTENTIALLY DEATHS. WHAT DO YOU THINK ABOUT THAT COMPARISON? DO YOU REALLY WANT TO COMPARE IT TO INFLUENZA?

MR. DUNN: NO. I MEAN, I THINK THE POINT IS THAT INFLUENZA HAS THE SAME CAPACITY TO KILL PEOPLE. SO IF THE GOVERNMENT'S INTEREST IS SORT OF STATED AT THE HIGH LEVEL OF JUST TO PREVENT DEATH, THAT DOESN'T DISTINGUISH THE DISEASE IN ANY WAY FROM INFLUENZA, WHICH --

THE COURT: SO ARE YOU SAYING INFLUENZA HAS KILLED MORE PEOPLE THAN THE VIETNAM WAR AND THE KOREAN WAR AND WORLD WAR I IN A SINGLE EIGHT MONTH, NINE MONTH PERIOD?

MR. DUNN: NO, NOT IN AN EIGHT MONTH -- WELL, IT HAS IN SOME YEARS. I THINK THE HIGHEST YEAR WE HAD WAS SOMETHING LIKE 80,000 FROM INFLUENZA, WHICH COULD BE MORE THAN THE VIETNAM WAR.

BUT I'M NOT SURE THAT'S -- THAT'S NOT NECESSARILY A USEFUL COMPARISON.

THE COURT: WHAT YEAR WAS THAT?

MR. DUNN: I DON'T KNOW. I WOULD HAVE TO GO BACK AND LOOK, BUT I THINK THAT'S WHAT I'VE SEEN AS SORT OF THE HIGH POINT.

THE COURT: ARE YOU TALKING ABOUT 1918 AND 1919?

MR. DUNN: NO. 1918 WAS I THINK EVEN WORSE THAN THAT. BUT A MORE RECENT EXTREME INFLUENZA SEASON.

THE COURT: YEAH, ALL RIGHT.

WELL, I'M GOING TO STOP YOU HERE. THANK YOU.

LET ME HEAR FROM MS. HADDAD. WHAT ARE THE MEDICAL DECLARATION SECTIONS THAT YOU WANT THE COURT TO FOCUS ON?

MS. HADDAD: THANK YOU, YOUR HONOR.

THE COURT: OR MR. BUSSEY, WHOEVER WANTS TO ANSWER FOR THE DEFENSE.

MS. HADDAD: WELL, MR. BUSSEY AND I WILL HAVE DIFFERENT -- WE SUBMITTED DIFFERENT DECLARATIONS.

THE COURT: RIGHT.

MS. HADDAD: SO IF IT'S ALL RIGHT, I'LL TELL YOU MINE AND THEN HE'LL TELL YOU HIS.

THE COURT: GO AHEAD.

MS. HADDAD: SO FOR DR. RUTHERFORD, HE SPECIFICALLY HAS A SECTION ENTITLED "TRANSMISSION RISKS," AND THAT'S AT PARAGRAPHS 74 TO 87.

HE ALSO HAS A SECTION ON THE VERACITY OF PCR TESTS AND WHY THEY ARE THE GOLD STANDARD, AND I WILL FIND THAT -- I WILL GET YOU THAT PARAGRAPH CITE BEFORE THE END OF THIS HEARING.

THE COURT: OKAY.

MS. HADDAD: DR. WATT HAS A SECTION ENTITLED "RISKS OF GATHERINGS." WE WOULD PARTICULARLY LIKE TO DRAW THE COURT'S ATTENTION TO THAT, AS WELL AS THE PURPOSES OF THE BLUEPRINT.

AND I WILL JUST SAY THAT PLAINTIFFS ARE IGNORING THE GOALS THAT ARE CLEARLY STATED IN OUR OWN DECLARATIONS. IT'S NOT JUST ABOUT -- THE BLUEPRINT AND RESTRICTIONS ARE NOT JUST ABOUT PREVENTING HOSPITALIZATIONS, ALTHOUGH THAT IS ONE VERY IMPORTANT PART.

AND THEN FINALLY DR. KURTZ, SHE -- HER DECLARATION IS QUITE SHORT, BUT IT DOES DETAIL HOW THE STATE -- THE COSTS AND BENEFITS THAT THE STATE WEIGHED AND THE ANALYSIS THAT THE STATE DID IN CREATING THE BLUEPRINT'S RESTRICTIONS, AND I WILL GET YOU HER SPECIFIC PARAGRAPHS AS WELL SHORTLY.

THE COURT: OKAY.

MR. BUSSEY: YOUR HONOR, FOR THE COUNTY DEFENDANTS, I'D LIKE TO BEGIN BY EMPHASIZING A FEW EXCERPTS FROM PLAINTIFFS' DECLARATIONS. IN PARTICULAR, AT PARAGRAPH 7 OF BHATTACHARYA'S REPLY DECLARATION, HE DOES NOT DISPUTE THE POINT THAT PCR TESTS ARE THE GOLD STANDARD FOR DETECTING THE PRESENCE OF THE VIRUS. HE SAYS ONLY THAT THEY DO NOT DETECT CURRENT INFECTIOUSNESS, WHICH WE WOULD SUBMIT IS BESIDE THE POINT. IF YOU GOT YOUR TEST ON FRIDAY AND YOU WERE INFECTIOUS ON WEDNESDAY, THAT'S STILL A REALLY IMPORTANT CONSIDERATION WHEN WE'RE TRYING TO MEASURE THE SPREAD OF THE VIRUS WITHIN THE

COMMUNITY.

ON PARAGRAPH 52 OF BHATIA'S REPLY DECLARATION, HE SAYS THAT THE STANDARD THAT PLAINTIFFS HAVE PROFFERED, HOSPITALIZATIONS, IS, QUOTE, "BASED EXCLUSIVELY ON CONFIRMED PCR TESTS." SO THEIR ALTERNATIVE MEASURE IS ALSO BASED ON OUR MEASURE.

AND THEN IN PARAGRAPH 53, BHATIA SAYS, QUOTE, "HOSPITALIZATION ADMISSIONS ARE NOT PERFECT MEASURES," END QUOTE. SO HE'S ADMITTING THERE THAT THEIR STANDARD IS NOT A PERFECT ONE, EITHER.

IN PARAGRAPH 64 OF BHATIA'S DECLARATION, I READ HIM TO BE SAYING THAT MOST OF THE TRANSMISSION OCCURRING RIGHT NOW IS IN HOUSEHOLDS, WHICH, OF COURSE, IS EXACTLY WHAT WE'RE TALKING ABOUT IN THIS CASE. WE'RE TALKING ABOUT A LOT OF THINGS, BUT THAT'S ONE OF THEM.

AND THEN WITH RESPECT TO THE COUNTY'S DECLARATIONS, I WOULD DIRECT THE COURT TO DR. LIPSITCH'S DECLARATION AT PARAGRAPHS 34 TO 44, WHICH IS WHERE HE TALKS ABOUT THE UTILITY OF PCR TESTS.

I WOULD DIRECT THE COURT TO DR. REINGOLD'S DECLARATION AT PARAGRAPHS 27 TO 36 ON THE SAME SUBJECT.

THE COURT: I'M SORRY. CAN YOU REPEAT THE REINGOLD PARAGRAPH NUMBERS AGAIN, PLEASE?

MR. BUSSEY: OF COURSE. I APOLOGIZE. PARAGRAPHS 27 THROUGH 36.

THE COURT: OKAY. GO AHEAD, PLEASE.

MR. BUSSEY: I WOULD THEN DIRECT THE COURT TO DR. MALDONADO'S DECLARATION. DR. MALDONADO IS AT STANFORD UNIVERSITY, THE SAME UNIVERSITY FROM WHICH PLAINTIFFS' EXPERTS HAIL. AND IN PARTICULAR, AT PARAGRAPHS 22 TO 26, SHE EXPLAINS THAT THE VIEW THAT THEY HAD PRESENTED TO THIS COURT HAS BEEN REJECTED BY THE MAJORITY OF EXPERTS IN THE RELEVANT FIELD, WHICH I THINK IS AN IMPORTANT HIGH LEVEL POINT TO KEEP IN MIND.

AND THEN FINALLY, I WOULD LIKE TO DIRECT THE COURT TO A NUMBER OF PARAGRAPHS FROM DR. CODY'S DECLARATION. SPECIFICALLY, SHE ADDRESSES THE IMPORTANCE, AND THAT IS THE INCREASED RISK PRESENTED BY A NUMBER OF FACTORS, AS FOLLOWS: SHE TALKS ABOUT THE DURATION OF GATHERINGS IN PARAGRAPHS 14 AND 59. SHE TALKS ABOUT INDOOR GATHERINGS BEING MORE DANGEROUS THAN OUTDOOR GATHERINGS IN PARAGRAPHS 28 TO 29. SHE ALSO TALKS IN THOSE SAME TWO PARAGRAPHS ABOUT PROLONGED SINGING, TALKING, AND SHOUTING.

THE COURT: THAT'S ALSO IN 28 AND 29?

MR. BUSSEY: THAT IS CORRECT.

SHE TALKS ABOUT THE SIZE OF GATHERING AS BEING IMPORTANT IN PARAGRAPH 34. IN PARAGRAPH 37, SHE TALKS ABOUT AND CITES SOME STUDIES ADDRESSING SPECIFIC INSTANCES WHERE COVID TRANSMISSION HAS BEEN TIED TO GATHERINGS, AND THE ONES I WOULD REFERENCE SPECIFICALLY ARE A CHURCH SERVICE IN A PRIVATE HOME -- THAT'S AT PARAGRAPH 37 AGAIN -- AND SHE ALSO TALKS IN

THAT SAME PARAGRAPH, 37, ABOUT LECTURES AT A UNIVERSITY, AND INDOOR BARS, BOTH OF WHICH LED TO CASES OF COVID-19 BEING TRANSMITTED TO OTHERS.

THANK YOU.

THE COURT: OKAY. LET ME ASK THE DEFENDANTS, AND YOU CAN DECIDE WHO WANTS TO ANSWER, OR IF BOTH OF YOU WANT TO ANSWER, WHY IS A COMPLETE PROHIBITION ON GATHERINGS NO GREATER THAN ESSENTIAL TO THE FURTHERANCE OF AN IMPORTANT GOVERNMENTAL INTEREST IN PREVENTING COVID?

MS. HADDAD: I'M SORRY, YOUR HONOR. WOULD YOU REPEAT THE QUESTION?

THE COURT: YEAH. WHY IS A COMPLETE PROHIBITION ON GATHERINGS NO GREATER THAN ESSENTIAL TO FURTHER THE GOVERNMENT'S INTEREST IN PREVENTING COVID?

MS. HADDAD: YOUR HONOR, I UNDERSTAND THAT YOU'RE ASKING UNDER THE NEW REGIONAL STAY AT HOME ORDER, ALL GATHERINGS ARE PROHIBITED. IS THAT CORRECT?

THE COURT: I'M ASKING, THE COMPLETE PROHIBITION ON GATHERINGS, WHY IS THAT NOT GREATER THAN ESSENTIAL?

MS. HADDAD: SO GATHERINGS ARE PROHIBITED, ARE PROHIBITED BASED ON THE RISK OF TRANSMISSION IN THE AREAS WHERE, WHERE COVID IS -- THE INFECTION RATES ARE AT THEIR HIGHEST. AND AS YOU RIGHTLY POINTED OUT, WHERE ICU BEDS ARE FULL OR NEARING CAPACITY, THE ACTIVITIES THAT POSED THE GREATEST RISK OF TRANSMISSION ARE THE ACTIVITIES THAT HAVE BEEN

THE FOCUS OF THE STATE'S RESTRICTIONS.

AND GATHERINGS IN PARTICULAR -- THE PURPOSE OF GATHERINGS IS FOR PEOPLE WHO KNOW EACH OTHER TO GET TOGETHER AND HAVE LONG FACE-TO-FACE INTERACTIONS IN AREAS -- AND IN THIS CASE WHERE PLAINTIFFS ARE CHALLENGING ARE GATHERINGS IN THEIR PRIVATE HOMES, OR THEY'RE CHALLENGING RESTRICTIONS ON GATHERINGS IN THEIR PRIVATE HOMES.

THESE ARE NOT AREAS -- THESE ARE NOT CONDUCIVE TO IMPOSING THE KINDS OF RESTRICTIONS THAT CAN MITIGATE THE TRANSMISSION OF THE VIRUS, FOR EXAMPLE, IN RETAIL OR IN OTHER AREAS THAT ARE MEANT FOR THE ASSEMBLY OF PEOPLE.

HERE WHEN PEOPLE GET TOGETHER, IT'S FACE-TO-FACE, IT'S MUCH HARDER TO HAVE, TO HAVE LONG-TERM -- TO HAVE -- TO OBSERVE COVID RESTRICTIONS FOR LONG PERIODS OF TIME, AND THEN THE RISK OF TRANSMISSION IS GREATER.

AND THAT'S WHY THE REGIONAL STAY AT HOME ORDER AT LEAST IMPOSED A COMPLETE GATHERING.

AND WE DO HAVE EXPERTS THAT HAVE TESTIFIED TO THIS IN THEIR DECLARATIONS, AND I CAN GET YOU -- I HAVE THOSE PARAGRAPH NUMBERS NOW, AND I HAVE THE OTHER PARAGRAPH NUMBERS I'D LIKE TO PROVIDE IF NOW IS A GOOD TIME.

THE COURT: OKAY. GO AHEAD.

MS. HADDAD: OKAY. SO I WOULD ALSO LIKE TO DRAW YOUR ATTENTION TO DR. RUTHERFORD'S DECLARATION, HIS PARAGRAPHS 50, 60, 76 THROUGH 77, AND 80.

DR. WATT, AT PARAGRAPH 44, 45 TO 46, THESE FOCUS SPECIFICALLY ON LIVING ROOM -- ON LIVING ROOM DISCUSSIONS.

REGARDING -- THERE'S ALSO -- WE ALSO HAVE SUBMITTED A DECLARATION OF DR. STOTO. PARAGRAPHS 17 THROUGH 24 AND PARAGRAPHS 30 THROUGH 34, THEY FOCUS ON HOW THE RESTRICTIONS ARE PROPORTIONAL TO THE RISK.

AND FINALLY, DR. KURTZ DISCUSSES THE BLUEPRINT AND THE PURPOSES OF THE BLUEPRINT AT 54 TO 57.

SO, YES, THAT'S IT FOR NOW.

THE COURT: OKAY.

MR. BUSSEY: AND, YOUR HONOR, IF I MAY BRIEFLY RESPOND TO THE QUESTION AS WELL?

THE COURT: OKAY. GO AHEAD, PLEASE.

MR. BUSSEY: SO I THINK THE COURT FRAMED THE QUESTION AS WHY A COMPLETE GATHERING BAN WAS APPROPRIATE, AND I WANT TO EMPHASIZE AT THE OUTSET THAT WHILE COMPLETE, THE COMPLETE BAN IS TEMPORARY AND IT'S TIED TO SOME SPECIFIC METRICS. SO WE'RE NOT TALKING ABOUT SOMETHING THAT'S GOING TO GO ON FOREVER.

THE OTHER POINT I WOULD LIKE TO EMPHASIZE IS HOW GATHERINGS ARE DEFINED IN THE RELEVANT DOCUMENTS, AT LEAST FROM THE COUNTY PERSPECTIVE. WE'RE TALKING SPECIFICALLY ABOUT EVENTS THAT INVOLVE CLOSE CONTACT BETWEEN INDIVIDUALS -- AND NOT ANY TYPE OF CLOSE CONTACT -- WE'RE TALKING ABOUT EXTENDED RATHER THAN TRANSIENT CONTACT, AND WE'RE TALKING ABOUT CONTACT THAT IS GOING TO INVOLVE TALKING OR OTHER ACTIVITIES THAT WOULD

EXPEL VIRUS-LADEN DROPLETS AND AEROSOLS.

AND IT'S JUST IMPRACTICAL FOR US TO SAY YOU CAN DO THAT, FOR EXAMPLE, BUT YOU CAN'T DO IT MORE THAN EIGHT MINUTES OR TEN MINUTES OR TWELVE MINUTES. YOU KNOW, AT SOME POINT YOU'RE GOING TO GET YOURSELF INTO A LINE DRAWING PROBLEM THAT JUST BECOMES IMPRACTICAL, VERY DIFFICULT TO UNDERSTAND, AND EQUALLY DIFFICULT TO ENFORCE.

THE COURT: LET ME JUST GET SOME CLARIFICATION ABOUT WHAT'S BEING CHALLENGED HERE. AS FAR AS THE FREE EXERCISE CLAIM, THE ONLY RESTRICTIONS BEING CHALLENGED ON GATHERINGS IS THE ONE THAT IS -- THE RESTRICTION THAT IS PREVENTING THE PLAINTIFFS FROM HOLDING BIBLE STUDIES. IS THAT RIGHT?

MR. DUNN: CORRECT, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

I KNOW THAT ONE OF THE PLAINTIFFS IS A MINISTER, BUT ARE ANY OF THESE PLAINTIFFS HOUSES OF WORSHIP, OR ALLEGING RESTRICTIONS ON HOUSES OF WORSHIP? IT SEEMS LIKE IT'S MORE FOCUSSED ON PRIVATE GATHERINGS THAT HAVE RELIGIOUS PURPOSES, LIKE BIBLE STUDIES IN THE HOME.

MR. DUNN: I THINK THAT'S RIGHT, YOUR HONOR. IF THEY WERE HOUSES OF WORSHIP, THEY WOULD BE ABLE TO MEET.

YOU KNOW, WE WERE A LITTLE SURPRISED HONESTLY, AND SOMEWHAT DISAPPOINTED, THAT THE DEFENDANTS' RESPONSE TO OUR MOTION WASN'T TO CLARIFY THAT THESE HAVE THE SAME SORT OF OPPORTUNITIES TO MEET AS CHURCHES DID.

BUT IN OUR VIEW, THEY SHOULD BE TREATED THE SAME AS CHURCHES WHEN YOU HAVE A PASTOR WHO'S LEADING ESSENTIALLY A SMALL INDOOR HOUSE CHURCH-TYPE MEETING.

AND BOTH WONG AND BUSCH HAVE PUT IN THEIR DECLARATIONS THAT THEY ARE COMMITTED TO THE SAME SORT OF SOCIAL DISTANCING, MASK WEARING, THAT APPLY IN CHURCHES.

SO THESE AREN'T AN ATTEMPT TO HAVE A SORT OF, YOU KNOW, NEW YEAR'S EVE PARTY UNDER THE GUISE OF A RELIGIOUS GATHERING OR SOMETHING LIKE THAT.

BOTH OF THESE FOLKS HAVE DEMONSTRATED A HISTORY OF HAVING THESE TYPES OF EVENTS. THESE AREN'T PLAINTIFFS WHO ARE JUST TRYING TO CONCOCT SOME SORT OF PRETENSE TO HAVE A GATHERING. THEY'VE HAD SEVERAL YEARS OF A PATTERN OF RELIGIOUS GATHERINGS.

SO, YOU KNOW, WE'RE NOT -- THIS SUIT IS NOT ABOUT, IN EVERY IN-HOME GATHERING, YOU KNOW, TRYING TO STRIKE A BLOW AT THAT. THAT'S JUST NOT WHAT THIS IS ABOUT.

THIS IS VERY SPECIFIC TO PEOPLE WHO ARE TRYING TO EXERCISE THEIR RELIGIOUS FAITH RESPONSIBLY IN THE SAME WAY THAT, YOU KNOW, THEY WOULD IN A CHURCH OR THAT, YOU KNOW, A POLITICAL EVENT WOULD TAKE PLACE.

AND THEN EVEN BEYOND THAT, THE BLUEPRINT HAS ALL SORTS OF INTERESTING EXEMPTIONS THAT ARE CLOSER TO THIS THAN YOU MIGHT THINK. SO, FOR EXAMPLE, THE BLUEPRINT HAS CARVED OUT THE ENTERTAINMENT INDUSTRY. SO YOU COULD FILM A TV SHOW IN A HOUSE FOR TWO HOURS, BUT YOU COULDN'T HAVE A BIBLE STUDY WITH THE

SAME NUMBER OF PEOPLE IN THE SAME HOUSE FOR AN HOUR.

SO IT'S THOSE TYPES OF THINGS THAT I THINK, ACCORDING TO THE SUPREME COURT'S RECENT DECISION IN DIOCESE OF BROOKLYN, YOU KNOW, IT MAKES IT -- IT CLEARLY TRIGGERS THE STRICT SCRUTINY, AND THEN THE QUESTION IS, DO YOU HAVE TO BAN THESE TYPES OF RELIGIOUS GATHERINGS TO ACCOMPLISH THE STATE'S INTEREST? OUR VIEW IS NO.

THE COURT: SO ARE YOU SAYING THE GATHERING BAN DOESN'T TREAT ALL GATHERINGS THE SAME WAY?

MR. DUNN: NO, IT DOES NOT. I MEAN, AT THE VERY -- AT THE VERY OUTSET, YOU HAVE TO DECIDE WHICH TIER YOU'RE WORKING ON. SO FOR EXAMPLE, IN THE RED TIER, CHURCHES ARE ALLOWED TO HAVE GATHERINGS INDOORS. POLITICAL GATHERINGS CAN HAPPEN INDOORS.

IN THE PURPLE TIER, CERTAIN THINGS CAN HAPPEN OUTDOORS.

BUT, FOR EXAMPLE, IF THE GANNONS WANTED TO HOST AN OUTDOOR, IN THEIR BACKYARD, POLITICAL DEBATE WITH MORE THAN THREE HOUSEHOLDS, THEY CAN'T DO IT.

YOU KNOW, THEY CAN GO TO A PROTEST WITH A THOUSAND PEOPLE, OR AT LEAST IN SANTA CLARA COUNTY, THERE MIGHT BE A 100 OR 200 PERSON LIMIT, BUT THEY CAN GO TO AN OUTDOOR PROTEST AND RUB SHOULDERS, BUT THEY CAN'T HAVE AN OUTDOOR DEBATE, EVEN IF EVERYONE IS SOCIALLY DISTANT.

SO THERE'S CLEAR DIVISIONS IN HOW THE GATHERINGS ARE TREATED.

WHEN WE FIRST FILED THE LAWSUIT, TANDON WASN'T EVEN ALLOWED TO HAVE A POLITICAL RALLY. HE COULDN'T HAVE A FUNDRAISER, EVEN THOUGH PROTESTS WERE ALLOWED. SO THE STATE CHANGED THAT RULE IMMEDIATELY AFTER WE FILED OUR LAWSUIT, WHICH IS WHY WE DIDN'T HAVE TO SEEK A TRO FOR THAT, AND THAT WAS GREAT. WE'RE HAPPY THAT THEY DID THAT. THAT WAS THE RIGHT THING.

BUT IT HIGHLIGHTS THAT THERE IS OTHER FIRST AMENDMENT CONDUCT THAT IS JUST AS VALUABLE THAT IS STILL NOT ALLOWED, AND THAT'S WHAT THE FIRST AMENDED COMPLAINT IN THIS CASE IS FOCUSSED ON.

THE COURT: LET ME HEAR FROM THE DEFENDANTS.

DO YOU AGREE THAT THE GATHERING PROHIBITION TREATS THE GATHERINGS DIFFERENTLY?

MS. HADDAD: NO, YOUR HONOR.

I THINK THIS TURNS ON WHAT THE DEFINITION, THE OPERATIVE DEFINITION OF A GATHERING IS THAT WE'RE OPERATING UNDER. AND FOR THE PURPOSES OF THESE RESTRICTIONS, GATHERINGS ARE IN-PERSON, FACE -- TYPICALLY FACE-TO-FACE GET TOGETHERS WITH PEOPLE THAT YOU KNOW FOR PROLONGED PERIODS OF TIME.

PLAINTIFFS ARE NOT ASSERTING THAT THEY WANT TO GO TO A PROTEST OR A RALLY OR THAT -- AND PLAINTIFFS ARE NOT ASSERTING THAT THEY WANT TO HAVE A PROTEST OR RALLY IN THEIR BACKYARD.

AND PLAINTIFF REVEREND WONG SPECIFICALLY ASSERTS IN HIS DECLARATION THAT HIS HOME IS NOT A HOUSE OF WORSHIP. THEY WANT

TO GATHER FOR THE PURPOSE OF BIBLE STUDY AND RELATED OR RELIGIOUS MATTERS, AND WE -- WE UNDERSTAND THAT THIS IS A RESTRICTION, BUT IT APPLIES JUST AS EQUALLY TO THE GANNONS, THE PLAINTIFFS WHO WISH TO HAVE A DISCUSSION OF POLITICAL IDEAS, AND IT APPLIES TO BOOK CLUBS. IT APPLIES ACROSS THE BOARD, AND IT APPLIES TO ALL OF THE UPCOMING HOLIDAY GATHERINGS THAT PEOPLE WISH TO HAVE IN THEIR HOMES.

SPECIFICALLY, THE -- THE -- AND THE ACTIVITIES THAT PLAINTIFFS ARE POINTING TO HERE AS, AS SUPPOSED COMPARATORS ARE -- THEY'RE NOT -- THEY CAN'T BE COMPARED. THEY CAN'T BE COMPARED TO EACH OTHER. THE ACTIVITIES THAT THEY POINT TO ARE NOT UNRESTRICTED. THEY HAVE THEIR OWN DIFFERENT RESTRICTIONS BASED ON THE ATTENDANT RISKS.

THE COURT: LET ME GO TO MR. DUNN.

ARE YOU SAYING THAT THE STATE GATHERING RESTRICTIONS ARE NOT NEUTRAL ON THEIR FACE?

MR. DUNN: CORRECT, YOUR HONOR.

SO, FOR EXAMPLE, I MEAN, A GATHERING THAT IS A PROTEST IS TREATED DIFFERENTLY THAN OTHER TYPES OF GATHERINGS, EVEN THOUGH THEY'RE ALL GATHERINGS. THOSE ARE SPECIFIC CARVEOUTS FROM THE GATHERING BAN, AND THEY ADDED THE GATHERING -- THEY ADDED THE CARVEOUT FOR POLITICAL RALLIES AFTER OUR LAWSUIT BECAUSE THAT WAS NOT ALLOWED AS THE GATHERING BAN WAS ORIGINALLY INSTITUTED. SO WE'VE ACHIEVED -- WE'VE BEEN ABLE TO GET SORT OF ONE CARVEOUT, AND THAT'S GOOD.

BUT OUR VIEW IS THAT THE CARVEOUT NEEDS TO BE BROADER AND EXTEND TO OTHER TYPES OF POLITICAL SPEECH. SO WE HAVEN'T ASKED FOR, YOU KNOW, A CARVEOUT FOR ALL FIRST AMENDMENT RELATED CONDUCT, EXPRESSIVE CONDUCT, DANCING OR SOMETHING LIKE THAT.

BUT FOR POLITICAL SPEECH, OUR VIEW IS THAT A GATHERING BY THE GANNONS SHOULD BE TREATED THE SAME AS A PROTEST AND AS A POLITICAL GATHERING BY TANDON.

SO IN OUR VIEW IT IS CONTENT-BASED ON ITS FACE. THAT'S -- WE'RE ASKING TO BASICALLY HARMONIZE IT SO THAT ALL OF THOSE ARE TREATED EQUALLY.

AND THEN THE SAME THING WITH WONG AND BUSCH. YOU KNOW, THEY AREN'T HOUSES OF WORSHIP, SO THEY CAN'T MEET INDOORS EVEN WHEN HOUSES OF WORSHIP ARE ALLOWED TO MEET INDOORS.

AND THEN I THINK THE DIOCESE OF BROOKLYN DECISION ADDRESSES MANY OF THE ARGUMENTS THAT DEFENDANTS' COUNSEL IS RAISING BECAUSE THE COURT VERY CLEARLY SAID IN THAT CASE YOU CAN'T TREAT HOUSES OF WORSHIP DIFFERENTLY THAN A LAUNDROMAT OR A LIQUOR STORE, EVEN THOUGH THOSE AREN'T IDENTICAL TYPES OF GATHERINGS. THERE -- SORT OF THE DISPARATE TREATMENT THERE TRIGGERS HEIGHTENED SCRUTINY.

SO IN THIS CASE --

THE COURT: BUT UNDER THE STAY AT HOME ORDER, HOUSES OF WORSHIP ARE ACTUALLY ONE OF THE ONLY PLACES WHERE PEOPLE ARE PERMITTED TO GATHER. SO TO THAT EXTENT, ROMAN CATHOLIC DIOCESE WOULDN'T APPLY. ISN'T THAT RIGHT?

MR. DUNN: OUR VIEW IS AT THE VERY LEAST A HOME WORSHIP SHOULD BE TREATED THE SAME AS A HOUSE OF WORSHIP. SO IF YOU'RE TRYING TO HAVE A HOUSE CHURCH, THERE'S NO REASON A HOUSE CHURCH, WHICH GOES BACK TO THE BEGINNINGS OF THE CHURCH, A HOUSE CHURCH SHOULDN'T BE TREATED DIFFERENTLY THAN A CHURCH IN A BUILDING. SO THAT'S SORT OF LIKE AS A FIRST ORDER THING.

NOW, WHETHER THE LIMITATIONS ON HOUSES OF WORSHIP GENERALLY, YOU KNOW, RUN AFOUL OF THE CONSTITUTION, THAT IS BEING LITIGATED IN OTHER CASES, AND I THINK IN THAT CASE THE COMPARATORS IS WITH OTHER TYPES OF, YOU KNOW, INDOOR GATHERINGS THAT ARE ALLOWED, RETAIL STORES AND STUDIO PRODUCTIONS, PROFESSIONAL SPORTS, THESE TYPES OF THINGS.

BUT FOR OUR PURPOSES, I THINK THE LEAD POINT IS THAT HOUSE GATHERINGS TO WORSHIP SHOULD NOT BE DISFAVORED VERSUS, YOU KNOW, THE SAME TYPE OF GATHERING THAT'S TAKING PLACE IN A CHURCH BUILDING.

THE COURT: MR. BUSSEY, DO YOU WANT TO RESPOND TO THAT?

MR. BUSSEY: ACTUALLY, I --

THE COURT: YOU HAVEN'T RESPONDED TO ANY OF THESE QUESTIONS SO FAR.

MR. BUSSEY: SURE. I WOULD FIRST POINT OUT THAT MOST OF THE ALLEGED INCONSISTENT EXAMPLES THAT MR. DUNN BEGAN RECITING ARE REFLECTED IN THE STATE ORDER THAT HE'S CHALLENGING, NOT IN THE COUNTY ORDER.

THE ONLY EXAMPLE I'VE HEARD WHERE HE SAYS THE COUNTY IS TREATING DIFFERENT THINGS -- OR SIMILAR THINGS DIFFERENTLY IS BY CALLING A VISIT TO A RETAIL STORE A GATHERING.

AND HE MAY TAKE AWAY FROM ROMAN CATHOLIC THE NOTION THAT RETAIL STORES AND EXTENDED IN-PERSON GATHERINGS NEED TO BE TREATED EXACTLY THE SAME, BUT I CERTAINLY DON'T TAKE THAT AWAY FROM THE OPINION FOR A NUMBER OF REASONS, ONE BEING THAT OUR ORDER IS NOT FACIALLY DISCRIMINATORY. IT'S NEUTRAL, UNLIKE THE ORDER IN THAT CASE.

AND NUMBER TWO, I DON'T KNOW WHAT RECORD WAS BEFORE THAT COURT BECAUSE THE OPINION DOESN'T ADDRESS THE SUBJECT AT ALL AS TO THE DIFFERENT RISKS PRESENTED BY DIFFERENT ACTIVITIES.

BUT THIS COURT DOES HAVE A VERY FULSOME RECORD WITH QUITE A FEW EXPERTS WHO HAVE EXPOUNDED ON THE DIFFERENT RISKS PRESENTED BY, SAY, A TRANSITORY TRIP TO A RETAIL STORE AND AN EXTENDED IN-PERSON GATHERING IN SOMEBODY'S HOME.

NOTHING IN ROMAN CATHOLIC, OR IN ANY OTHER OPINION, PREVENTS THIS COURT FROM ALLOWING THE GOVERNMENT TO TREAT THOSE ACTIVITIES DIFFERENTLY BECAUSE THEY INVOLVE DIFFERENT RISKS.

AT MOST, YOU COULD TAKE AWAY FROM ROMAN CATHOLIC THE NOTION THAT A VERY EXTREMELY DISPARATE TREATMENT IS NOT GOING TO BE OKAY. AND I THINK IT'S -- IT'S IMPORTANT TO FOCUS ON THE FACTS THAT ARE DISCUSSED IN THAT OPINION. YOU HAD HOUSES OF WORSHIP THAT COULD ACCOMMODATE, I THINK, A THOUSAND OR MAYBE MORE THAN A THOUSAND PEOPLE.

HERE WE'RE TALKING ABOUT THE WONGS AND BUSCHS GATHERING IN THEIR HOME.

AND I WILL ADD, TOO, THAT THERE DOES SEEM TO BE A LACK OF CLARITY IN THE DEFINITION OF RELIGIOUS GATHERINGS. WHEN I LOOK AT THEIR PROPOSED ORDER, IT'S ONE THAT WOULD ENJOIN THE GOVERNMENT FROM PREVENTING RELIGIOUS GATHERINGS IN HOMES, AND YES, THEY DO DESCRIBE THEIR GATHERINGS IN PART AS CONSISTING OF WORSHIP, BUT THEY ALSO DESCRIBE THEM AS CONSISTING OF THEOLOGICAL DISCUSSION AND BIBLE STUDIES, AND IT'S QUITE UNCLEAR TO ME WHAT NEEDS TO BE SATISFIED FOR SOMETHING TO QUALIFY AS A RELIGIOUS GATHERING.

IT'S THE HOLIDAY SEASON, RIGHT? MOST GATHERINGS THAT ARE HAPPENING RIGHT NOW HAVE SOME KIND OF RELIGIOUS DIMENSION TO THEM. PEOPLE GET TOGETHER FOR CHRISTMAS, FOR EXAMPLE, AND SURROUNDING HOLIDAYS.

SO IF THE IDEA IS THAT YOU CAN'T GATHER EXCEPT WHEN THERE'S SOME SORT OF RELIGIOUS DIMENSION TO THE GATHERING, YOU KNOW, THAT'S AN EXCEPTION YOU CAN DRIVE A TRUCK THROUGH, AND THAT'S FAR DIFFERENT FROM THE FACTS THAT WERE PRESENTED IN ROMAN CATHOLIC OR ANY OTHER CASE THAT I'M AWARE OF.

THE COURT: MR. DUNN, DO YOU WANT TO ANSWER WHY WE SHOULD COMPARE RELIGIOUS GATHERINGS TO SHOPPING INSTEAD OF SECULAR GATHERINGS?

MR. DUNN: SORRY, YOUR HONOR. YOU PAUSED THERE FOR A SECOND. CAN YOU SAY THAT AGAIN?

THE COURT: OH. WOULD YOU LIKE TO ADDRESS SORT OF WHAT MR. BUSSEY WAS SAYING ABOUT WHY, WHY COMPARE RELIGIOUS GATHERINGS TO RETAIL SHOPPING VERSUS COMPARING IT TO SECULAR GATHERINGS?

MR. DUNN: RIGHT. I SEE WHAT YOU'RE SAYING.

WELL, I MEAN, I THINK THE MAIN ISSUE IS THAT WHEN YOU ARE ALLOWING PEOPLE TO GATHER INSIDE, YOU KNOW, THE STATE IS ESSENTIALLY MAKING A DECISION ABOUT WHAT IS ESSENTIAL AND WHAT IS NOT ESSENTIAL.

AND IT CAN DO THAT VIS-A-VIS SECULAR GATHERINGS. IT CAN DECIDE THAT THIS SECULAR GATHERING IS NOT AS ESSENTIAL AS THAT SECULAR GATHERING.

BUT AT SOME LEVEL, WHENEVER PEOPLE ARE GATHERED INDOORS, IT'S ALL GATHERINGS. AND OUR VIEW IS THAT THERE ARE MANY GATHERINGS EXEMPTED IN THE BLUEPRINT, SUCH AS LAW FIRMS CAN OPERATE AND THERE CAN BE BUSINESS MEETINGS INSIDE A LAW FIRM OFFICE. PRESUMABLY THOSE WOULD ALL NEED TO BE SOCIALLY DISTANCED AND MASKED AND BEST PRACTICES.

AND OUR VIEW IS THE SAME EXACT TYPE OF THING COULD BE DONE IN THE HOME.

AND SAME IDEA, AGAIN, WITH FILMING A MOVIE IN A HOME. THAT'S A GATHERING.

BASICALLY THE WAY IT IS DEFINED, A GATHERING IS ANY TIME PEOPLE COME TOGETHER IN THE SAME PLACE.

NOW, A WAL-MART MIGHT BE SORT OF DIFFERENT ENOUGH THAT YOU

COULD HAVE DIFFERENT RULES FOR A WAL-MART THAN AN IN-HOME GATHERING.

BUT IN OUR VIEW THE STATE HAS CARVED OUT SUFFICIENT EXEMPTIONS TO IT THAT, AT THE VERY LEAST, IT HAS TO SATISFY STRICT SCRUTINY. IT DOESN'T MEAN IT AUTOMATICALLY FAILS, BUT IT HAS TO SHOW THAT IT'S NARROWLY TAILORED. I THINK THAT WAS WHAT DIOCESE OF BROOKLYN REALLY SORT OF HAMMERS HOME IS THAT THE STATE CAN'T JUST SORT OF WAVE ITS HANDS AND GET BY WITH SAYING, TRUST OUR EXPERTISE. IT HAS TO ACTUALLY PROVE UP WHY IT IS ESSENTIAL TO BAN THOSE TYPES OF RELIGIOUS GATHERINGS.

THE COURT: MS. HADDAD, DO YOU WANT TO RESPOND?

MS. HADDAD: YES, YOUR HONOR.

THE COURT: GO AHEAD, PLEASE.

MS. HADDAD: FIRST, MR. DUNN, I THINK, IS READING FAR TOO MUCH INTO ROMAN CATHOLIC. ROMAN CATHOLIC CONCERNED A, A RULE THAT ONLY APPLIED TO HOUSES OF WORSHIP THAT WAS DESCRIBED AS BEING SIGNIFICANTLY HARSHER THAN RESTRICTING -- THAN ANY RESTRICTIONS OR NO RESTRICTIONS ON A VARIETY OF ACTIVITIES AT DIFFERENT RISK LEVELS.

ALSO, ROMAN CATHOLIC DOES NOT MANDATE STRICT SCRUTINY IN EVERY -- EVERY TIME -- FOR EVERY RESTRICTION THAT IS ON A HOUSE OF WORSHIP OR ON RELIGIOUS SERVICES OR THAT IMPACTS RELIGION.

RATHER, THE SUPREME COURT, SINCE ROMAN CATHOLIC ISSUED, HAS REMANDED THREE CASES BACK TO THE DISTRICT COURT -- NOT TO THE CIRCUIT COURT, BUT TO THE DISTRICT COURT -- TO ANALYZE

THOSE STATES' RESTRICTIONS AND TO SEE WHETHER -- TO DETERMINE WHETHER ROMAN CATHOLIC APPLIES.

AND THE NINTH CIRCUIT, IN FACT, DID THAT JUST LAST WEEK IN HARVEST ROCK.

REGARDING WHETHER OR NOT -- REGARDING PLAINTIFFS' COMPARISON OF RESTRICTIONS ON RELIGIOUS GATHERINGS TO HOUSE OF WORSHIP RESTRICTIONS, AGAIN, THAT IS -- THAT'S AN INAPT COMPARISON. THEY ARE TWO DIFFERENT ACTIVITIES WITH DIFFERENT RISKS.

AND I DO WANT TO POINT OUT THAT JUSTICE KAVANAUGH, IN HIS CONCURRENCE IN ROMAN CATHOLIC, DID SAY THAT THE STATE HAS AUTHORITY TO IMPOSE EVEN VERY STRICT RESTRICTIONS ON ATTENDANCE OF RELIGIOUS SERVICES AND SECULAR GATHERINGS ALIKE.

THAT'S APPROPRIATE HERE. AS MR. BUSSEY POINTED OUT, THERE'S NOTHING IN ROMAN CATHOLIC THAT OVERRULES STORMANS OR OVERRULES CHURCH OF LUKUMI. THERE'S STILL A RISK-BASED ANALYSIS AND A COMPARISON ANALYSIS OF ANY RELEVANT EXCEPTIONS TO BE DONE BY THE COURT TO DETERMINE WHETHER OR NOT THE COURT -- THE STATE'S RESTRICTIONS, IN FACT, ARE NOT NEUTRAL AND GENERALLY APPLICABLE.

I WOULD ALSO POINT THE COURT'S ATTENTION TO A SIXTH CIRCUIT DECISION THAT ISSUED AFTER ROMAN CATHOLIC ANALYZING -- LOOKING AT KENTUCKY'S RESTRICTIONS ON SCHOOL CLOSURES. THERE WAS A FREE EXERCISE CHALLENGE THERE BROUGHT BY RELIGIOUS SCHOOLS, AND KENTUCKY THERE FOUND, EVEN IN CONSIDERATION OF

ROMAN CATHOLIC, THAT THAT RULE, LIKE THIS ONE, THE RULE WAS NEUTRALLY APPLICABLE EVEN THOUGH THERE ARE ALSO EXCEPTIONS FOR RETAIL AND FOR IN-PERSON WORSHIP AND FOR OTHER GATHERINGS AS WELL, BECAUSE THE SIXTH CIRCUIT NOTED THAT THOSE RESTRICTIONS WERE BASED ON THE COMPARABLE RISKS AND WHETHER MASK WEARING AND SOCIAL AND PHYSICAL DISTANCING AND SANITATION MEASURES COULD COMPLETELY ELIMINATE THAT RISK OR REDUCE THAT RISK ENOUGH TO MEET THE STATE'S INTEREST, AND WE DO THINK THAT'S INSTRUCTIVE HERE.

THE COURT: IN YOUR COMBINED SUPPLEMENTAL BRIEF -- I'M LOOKING AT THE BOTTOM OF PAGE 4 -- YOU SAY, "IN THEORY, PLAINTIFFS COULD SATISFY THESE HOUSE OF WORSHIP REQUIREMENTS AND CONDUCT A WORSHIP SERVICE UNDER THE GUIDANCE IN THEIR HOME, BUT PLAINTIFFS HAVE NOT ALLEGED THAT THEY INTEND TO DO SO."

SO I GUESS THE QUESTION IS, DOES THE -- DOES THE GUIDANCE PERMIT PRIVATE PLAINTIFFS TO HOLD WORSHIP SERVICES, OR NOT?

MS. HADDAD: SO --

THE COURT: YOU SAY THEY COULD.

MS. HADDAD: SO, YOUR HONOR, THE -- IF PLAINTIFFS ASSERT THAT THEY ARE HOUSES OF WORSHIP --

THE COURT: UM-HUM.

MS. HADDAD: -- AND THAT THEY WISH -- AND THAT THEY -- THAT THEY WISH TO HAVE THEIR RELIGIOUS GATHERING -- THEIR RELIGIOUS WORSHIP IN THEIR OWN PRIVATE HOME, THAT THEIR OWN PRIVATE HOMES ARE HOUSES OF WORSHIP, THEY COULD CONCEIVABLY

HAVE THOSE RULES APPLY TO THEM IF THEY CAN MEET ALL OF THE REQUIREMENTS, NOT JUST COVID-RELATED REQUIREMENTS, BUT NON COVID-RELATED REQUIREMENTS THAT FOLLOW HOUSES OF WORSHIP.

BUT AS I NOTED EARLIER, ONE OF THE PLAINTIFFS HAS SAID AFFIRMATIVELY HIS HOME IS NOT A HOUSE OF WORSHIP, AND NEITHER PLAINTIFF IS ASSERTING THAT THEY WANT THE HOUSE OF WORSHIP GUIDELINES TO APPLY TO THEM.

THEY WANT, RATHER, AN EXCEPTION TO THE GATHERING GUIDELINES.

THE COURT: CAN ANYONE JUST CIRCUMVENT THE GUIDANCE AND JUST SELF DECLARE THAT THEIR HOUSE IS A HOUSE OF WORSHIP? I GUESS I'M NOT CLEAR ON --

MS. HADDAD: YOUR HONOR, IT'S CONCEIVABLE THAT PEOPLE WOULD BE ABLE TO SHOW THAT THEY COMPLY WITH ANY LOCAL ZONING RULES AND THAT THEY -- ANY ATTENDANT -- IF THERE'S INSURANCE REQUIREMENTS -- THOSE ARE NON COVID REGULATIONS.

AND THEN REGARDING THE COVID RESTRICTIONS, IF PLAINTIFFS -- IF SOMEONE CAN SHOW THAT THEIR HOME QUALIFIES AS A HOUSE OF WORSHIP, THEN CONCEIVABLY, YES.

THE COURT: OKAY.

MS. HADDAD: BUT I -- OH, SORRY.

THE COURT: OH, GO AHEAD. DID YOU FINISH? I WANT TO LET YOU FINISH.

MS. HADDAD: I JUST WANTED TO REITERATE AGAIN THAT PLAINTIFFS HERE ARE ASSERTING NO SUCH THING.

THE COURT: HOW -- YOU KNOW, ONE OF THE THINGS THAT THE DEFENDANT SORT OF RELIED ON, YOU KNOW, BEFORE ROMAN CATHOLIC WAS CHIEF JUSTICE ROBERTS' CONCURRENCE IN SOUTH BAY UNITED PENTECOSTAL CHURCH. IN LIGHT OF ROMAN CATHOLIC DIOCESE, HOW USEFUL IS THAT ANYMORE?

MR. DUNN: NOT AT ALL FROM OUR PERSPECTIVE.

THE COURT: ALL RIGHT.

LET ME HEAR FROM THE DEFENDANTS.

MS. HADDAD: YOUR HONOR, I THINK YOU'RE REFERRING TO HIS STATEMENT THAT DEFERENCE MUST -- THAT STATE EXPERTISE MUST BE -- MUST BE GIVEN DEFERENCE TO. IS THAT CORRECT?

THE COURT: I'M -- I'M REFERRING TO HIS WHOLE CONCURRENCE. IS IT WORTH EVEN RELYING ON THAT ANYMORE?

MS. HADDAD: WELL, TO THE EXTENT THAT -- TO THE EXTENT THAT THAT CONCURRENCE INCLUDES A -- TO THE EXTENT THAT THE CONCURRENCE GIVES DEFERENCE TO STATE EXPERTISE, TO MEDICAL EXPERTISE AND DATA-DRIVEN OPINIONS ON HOW TO HANDLE A PUBLIC HEALTH CRISIS, WE THINK IT DOES.

AS WE POINTED OUT IN OUR SUPPLEMENTAL DECLARATION, IN ROMAN CATHOLIC, THEY DID -- THE COURT DID NOTE THAT DEFERENCE MUST BE GIVEN TO THOSE DECISIONS, AND WE THINK THAT THERE -- A MAJORITY OF THE COURT BELIEVES THAT, AND WE CITED TO THOSE DECLARATIONS -- EXCUSE ME -- TO THOSE DECISIONS THAT POINT THAT OUT.

AND ALSO, WE WOULD NOTE THAT IN CALGARY CHAPEL, WHICH THE

NINTH CIRCUIT ISSUED EARLIER THIS WEEK, THEY ALSO NOTED THAT IT'S IMPORTANT TO -- THAT STATES ARE THE ONES THAT HAVE THE EXPERTISE IN MAKING THESE PUBLIC HEALTH -- MAKING THESE PUBLIC HEALTH DETERMINATIONS.

THE COURT: LET ME ASK MR. DUNN, JUST FOR CLARIFICATION OF YOUR DUE PROCESS CLAIM, IS THE RIGHT AT ISSUE IN THAT CLAIM THE RIGHT TO MAKE A LIVING OR THE RIGHT TO CHOOSE ONE'S OWN EMPLOYMENT?

MR. DUNN: SPECIFICALLY IT WOULD BE THE RIGHT TO EARN A LIVING.

THE COURT: OKAY. AND WOULD YOU AGREE THAT THAT'S NOT A FUNDAMENTAL RIGHT?

MR. DUNN: I WOULD AGREE THE SUPREME COURT HAS NOT SQUARELY HELD THAT IT'S A FUNDAMENTAL RIGHT. I THINK WE WOULD RESERVE THAT FOR APPEAL.

I MEAN, I -- FROM OUR PERSPECTIVE, IT SHOULD BE A FUNDAMENTAL RIGHT AND IT IS A FUNDAMENTAL RIGHT, BUT WE CONCEDE THAT THE SUPREME COURT HAS NOT YET HELD THAT SQUARELY.

THE COURT: OKAY. LET ME RAISE A POINT THAT THE PLAINTIFFS RAISE IN THEIR REPLY BRIEF, AND THAT IS THAT THE SUPREME COURT DECLINED TO DISCUSS JACOBSON IN THE PER CURIAM OPINION IN ROMAN CATHOLIC. WHAT'S YOUR RESPONSE TO THAT?

MS. HADDAD: WELL, YOUR HONOR, WHILE THEY DIDN'T DISCUSS JACOBSON, THEY DID NOTE THE DEFERENCE TO STATE DETERMINATIONS AS TO, AS TO MEDICAL EXPERTISE AND DATA-DRIVEN

DETERMINATIONS.

AND WE WOULD ALSO ARGUE THAT TO THE EXTENT THEY DIDN'T CONSIDER JACOBSON IN THE FREE -- IN THE CONTEXT OF A FREE EXERCISE CLAIM, THAT CERTAINLY DOESN'T APPLY IN THE CONTEXT OF THE FIRST AMENDMENT CLAIM OR PLAINTIFFS' EQUAL -- EXCUSE ME -- OTHER FIRST AMENDMENT CLAIMS, FREE SPEECH AND FREEDOM OF ASSOCIATION CLAIMS, AND PLAINTIFFS' DUE PROCESS PROTECTION CLAIMS.

BUT MOREOVER, WE ARE CONFIDENT THAT OUR, OUR RULES SURVIVE UNDER TRADITIONAL CONSTITUTIONAL ANALYSIS.

THE COURT: LET ME ASK MR. DUNN, DO YOU AGREE THAT THE RATIONAL BASIS REVIEW APPLIES TO YOUR EQUAL PROTECTION CLAIMS?

MR. DUNN: YES, WE DO, YOUR HONOR. AS WE'VE LAID OUT, WE THINK IT HAS TO BE AT THE HEIGHTENED RATIONAL BASIS, A RATIONAL BASIS WITH A BITE.

THIS IS NOT THE TYPE OF CASE WHERE IT IS APPROPRIATE TO APPLY THE SORT OF EVERYDAY CONCEIVABLE BASIS WHEN YOU'RE DEALING WITH UNPRECEDENTED RESTRICTIONS FOR -- YOU KNOW, IT LOOKS LIKE IT'LL BE GOING ON OVER A YEAR THAT HAVE REALLY DESTROYED CALIFORNIA BUSINESSES, YOU KNOW, RAISED SUICIDE RATES, ADDICTION RATES.

IT'S ONE OF THE THINGS THAT IS SORT OF STUNNING TO US FROM THE DEFENDANTS' BRIEFS IS THEY REALLY HAVE MADE NO EFFORT TO SHOW HOW ANY OF THE MASSIVE COSTS THAT HAVE BEEN INFLICTED ARE

WORTH IT. IT'S ALL SORT OF FOCUSSED ON VIRUSES, THAT THERE WAS NO COLLATERAL DAMAGES.

BUT AS DR. BHATTACHARYA LAID OUT IN HIS REPLY DECLARATION THAT THERE'S BEEN AN ENORMOUS AMOUNT OF COLLATERAL DAMAGE, BEYOND JUST THE ECONOMIC DAMAGE, IN TERMS OF PUBLIC HEALTH. AS HE EXPLAINED, THE EXCESS DEATHS FOR PEOPLE AGES 29 TO 45, IT'S LIKE 26 PERCENT, AND A TEENY PERCENT OF THAT IS COVID RELATED.

SO THERE'S -- CLEARLY PEOPLE ARE DYING AS A RESULT OF THINGS OTHER THAN COVID, AND MOST SIGNS POINT TO LOSS OF JOBS, ISOLATION, DEPRESSION AND THESE THINGS OF TYPES.

SO WHEN THE STATE IS ENACTING THAT TYPE OF REGIME, OUR ARGUMENT IS, AT THE VERY MINIMUM, IT HAS TO BE A RATIONAL BASIS WITH A BITE. THERE HAS TO BE SOME ANALYSIS OF THE FACTUAL RECORD. IT CAN'T JUST BE ANY CONCEIVABLE BASIS AND, FINE, WE LET THE STATE CLOSE BUSINESSES FOR A YEAR.

THE COURT: DO ANY DEFENDANTS WANT TO RESPOND TO THAT?

MR. BUSSEY: YES.

THE COURT: I'M ASSUMING YOU'RE GOING TO HAVE A CAUSATION ARGUMENT, THAT A LOT OF THESE ARE GOING TO HAPPEN ANYWAY, SOME OF THE SOCIAL DISTANCING WOULD HAPPEN ANYWAY EVEN IF IT WASN'T MANDATED BY GOVERNMENT. WHAT ELSE?

MR. BUSSEY: SURE. A FEW POINTS I WOULD MAKE.

FIRST IS THAT THEY ARGUED RATIONAL BASIS IN THEIR MOVING PAPERS, AND I DIDN'T SEE AN APPEARANCE OF RATIONAL BASIS WITH A

BITE UNTIL THEIR REPLY BRIEF, SO I THINK THERE'S AN ARGUMENT THAT THAT HAS BEEN WAIVED. THAT'S NUMBER ONE.

NUMBER TWO, THE CASE THAT THEY CITE FOR THE PROPOSITION THAT A RATIONAL BASIS WITH A BITE SHOULD APPLY IS A NORTHERN DISTRICT CASE, UNITED STATES V. WILDE, AND THAT CASE SAYS THE STANDARD APPLIES WHEN A LAW OR REGULATION APPEARS TO HAVE BEEN BASED ON ANIMUS OR A DESIRE TO HARM A POLITICALLY UNPOPULAR GROUP.

AND AS I UNDERSTAND THEIR ALLEGATIONS HERE, THEY'RE ALLEGING EXACTLY THE OPPOSITE OF THAT, THAT THIS IS A SOCIETY-WIDE RESTRICTION THAT IS HURTING EVERYBODY. IT HASN'T BEEN TARGETED ONLY ON AN UNPOPULAR GROUP.

AND THEN AS TO THE LAST POINT, THE NOTION THAT MANY DEATHS AND HARMS ARE ATTRIBUTABLE TO THIS, THE REALITY IS WE DON'T KNOW WHY ALL OF THOSE DEATHS ARE OCCURRING.

WE DO KNOW THAT THERE'S A DISEASE THAT'S GOING THROUGH THE COMMUNITY, AND WE KNOW THAT DISEASE IS CAUSING A LOT OF SUFFERING. HOW MUCH OF THE EXCESS DEATHS CAN BE ATTRIBUTED TO THE DISEASE WE DON'T KNOW.

AND AGAIN, OUR ABILITY TO IDENTIFY SOMEBODY AS HAVING DIED FROM COVID-19 AS OPPOSED TO SOMETHING ELSE IS LIMITED.

AND THEN ANOTHER POINT WE'RE SEEING RIGHT NOW IS THAT HOSPITALS ARE COMPLETELY FULL AND THERE MAY BE SOME EFFECTS THERE FOR PEOPLE WHO DON'T HAVE COVID WHO MAY HAVE MORE DIFFICULTY GETTING THE TREATMENT THEY NEED BECAUSE OF COVID.

COVID RATES ARE SURGING. PEOPLE ARE BEING DRIVEN NOT TO THE CLOSEST HOSPITAL RIGHT NOW, BUT THEY'RE BEING DRIVEN TO HOSPITALS FARTHER AWAY BECAUSE THERE'S NO BEDS IN THE ONE NEAR THEM.

SO THERE'S AT LEAST SOME PERCENTAGE OF THOSE EXCESS DEATHS THAT, ALTHOUGH NOT DIRECTLY ATTRIBUTABLE TO COVID, ARE INDIRECTLY ATTRIBUTABLE TO THE DISEASE RATHER THAN THE SHELTER IN PLACE ORDERS THAT HAVE BEEN IMPOSED IN RESPONSE TO THE DISEASE.

MS. HADDAD: YOUR HONOR --

THE COURT: LET ME ASK -- I'M SORRY. GO AHEAD, PLEASE.

MS. HADDAD: THANK YOU, YOUR HONOR.

I JUST WANTED TO BRIEFLY ADD TWO POINTS.

ONE, OUR EXPERTS HAVE DISCUSSED AT LENGTH WHY OUR RESTRICTIONS ARE PROPORTIONAL TO THE HARMS CAUSED AND WHY THE RESTRICTIONS THAT ARE IMPOSED ARE PROPORTIONAL TO -- AND THAT THE INDIVIDUAL LIBERTIES THAT ARE RESTRICTED ARE -- AGAIN, THEY ARE PROPORTIONAL TO THE RELEVANT HARMS.

AND I'VE PROVIDED THE PARAGRAPH NUMBERS FOR THAT, SO I WOULD REQUEST THAT THE COURT, THAT THE COURT LOOK AT THAT.

ALSO, WHAT PLAINTIFFS WANT ARE NO RESTRICTIONS -- WELL, ONLY RESTRICTIONS ON A VERY TARGETED PORTION OF THE POPULATION, AND THAT SIMPLY -- WHILE IT WOULD BE WONDERFUL TO SAY THAT ONLY -- THAT COVID ONLY AFFECTS OR ONLY DOES EGREGIOUS HARM TO

THE ELDERLY AND THAT THE RESTRICTIONS THAT CAN BE IMPLEMENTED CAN JUST TARGET LONG-TERM CARE FACILITIES, THAT WON'T STOP THE SPREAD OF THIS VIRUS.

AND AS WE'VE SHOWN, AS OUR DECLARANTS HAVE SUBMITTED, WE HAVE ALSO TARGETED LONG-TERM HEALTH CARE FACILITIES AND NURSING HOMES.

BUT ALONE, AS OUR EXPERTS HAVE SAID, THAT WILL NOT STOP THE SPREAD OF THE VIRUS AND THAT WILL NOT STOP THE ATTENDANT DEATHS AND THE LONG-TERM HEALTH EFFECTS THAT THE VIRUS -- THAT WE'RE JUST ONLY NOW LEARNING ABOUT.

THE COURT: LET ME ASK MR. DUNN A FOLLOW-UP QUESTION TO MS. HADDAD'S POINT, AND THAT IS THAT IT'S HARD TO TARGET ONLY VULNERABLE POPULATIONS BECAUSE PEOPLE WHO ARE WORKING IN FOOD SERVICE OR CUSTODIAL CAPACITY OR CAREGIVING CAPACITY AT A NURSING HOME WILL PRESUMABLY NOT BE OLD ENOUGH THAT THEY NEED TO BE LIVING IN THAT NURSING HOME, BUT WILL BE YOUNGER, MAYBE MORE LIKELY A POPULATION TO BE ASYMPTOMATIC.

SO HOW CAN WE SEGREGATE RESTRICTIONS ON JUST THAT POPULATION WHEN THEY'RE GOING TO COME INTO CONTACT -- OR THEY DON'T HAVE THE PRIVILEGE OF LIVING IN A NURSING HOME, BUT ARE ACTUALLY LIVING IN A HIGH DENSITY HOUSE WITH JUST A LOT OF, YOU KNOW, YOUNGER RELATIVES, CHILDREN, GRANDCHILDREN, NIECES AND NEPHEWS. HOW DO WE DO THAT WHEN OUR WORLD IS VERY INTERTWINED ACROSS GENERATIONS?

MR. DUNN: I THINK DR. BHATIA'S DECLARATION IS WHERE

I WOULD DIRECT YOU ON THIS ONE. I MEAN, AS HE EXPLAINED, THERE IS A MASSIVE DIFFERENCE IN OUTCOMES IN THE VARIOUS NURSING HOMES THAT CAN REALLY ONLY BE EXPLAINED BY THE INTERVENTIONS CHOSEN AND THE PRECAUTIONS TAKEN AT THOSE NURSING HOMES.

HE IDENTIFIED ONE IN SAN FRANCISCO AND THE CAL VET NURSING HOME, WHO PRESUMABLY FACE NEARLY IDENTICAL RISKS TO OTHER NURSING HOMES OPERATED BY THE STATE, AND NOTED THAT THE DEATHS WERE ESSENTIALLY 0 AND 1 BECAUSE THEY HAD IMPLEMENTED FAR MORE RIGOROUS TESTING PROTOCOLS FOR THOSE WHO WORK THERE, HYGIENE PROTOCOLS, YOU KNOW, RESTRICTIONS ON VISITATIONS.

CERTAINLY IT'S NOT EASY, AND AS WE EXPLAINED, IT'S NOT -- IT'S NOT LIKE YOU CAN TOTALLY SEAL OFF THE VULNERABLE FROM THE INVULNERABLE UNTIL, YOU KNOW, THERE'S BEEN SOME SORT OF RESISTANCE BUILT UP IN THE COMMUNITY.

BUT CERTAINLY IT CAN BE TARGETED FAR MORE THAN IT HAS BEEN. WE WILL TAKE THE DEFENDANTS AT THEIR WORD THAT THEY'RE SORT OF MOVING IN THAT DIRECTION AND DOING WHAT THEY CAN.

AND IN TERMS OF AN OVERARCHING STRATEGY, WHAT WE TAKE FROM THE DEFENDANTS' DECLARATIONS IS ESSENTIALLY, YOU KNOW, IT'S IMPOSSIBLE TO DO THAT, AND SO THE ONLY WAY TO HELP THESE PEOPLE IS TO SLOW DOWN THE SPREAD OF THE VIRUS ACROSS THE ENTIRE POPULATION, SO WE HAVE TO RESTRICT EVERYBODY, EVEN THE YOUNG, EVEN THE VERY YOUNG -- YOU KNOW, SCHOOLS ARE STILL CLOSED BY AND LARGE AROUND CALIFORNIA EVEN THOUGH THEY'RE NOT AT RISK AT ALL -- AND THAT'S THE ONLY WAY TO PROTECT THE ELDERLY.

AND FROM WHAT WE HAVE PRESENTED, THAT'S NOT ACTUALLY THE CASE. SO OUR VIEW IS THERE'S FAR MORE THAT CAN BE DONE, BOTH FOR PEOPLE WHO LIVE IN NURSING HOMES AND FOR FOLKS WHO HAVE ASSISTED LIVING. I THINK THAT'S A MUCH LARGER POPULATION EVEN, FOLKS WHO GET SOME SORT OF IN-HOME CARE.

AND THEN AS YOU MENTIONED, THERE ARE MULTIGENERATIONAL FAMILIES, AND WHAT WE PRESENTED IS THERE'S OPPORTUNITIES TO PROVIDE ESSENTIALLY ISOLATION HOUSING, YOU KNOW, SEPARATE FROM THAT FOR THOSE FOLKS.

YOU KNOW, WE'RE NOT A TOTALITARIAN SYSTEM, SO WE'RE NOT A PLACE THAT'S GOING TO FORCE PEOPLE TO QUARANTINE OUTSIDE THEIR HOME, BUT CERTAINLY MAKING THAT AVAILABLE, AS EVEN CHICAGO HAS -- JAPAN HAS DONE THIS, AND OTHER PLACES -- AND THAT WOULD DRASTICALLY REDUCE THE DEATHS WHICH ARE, AS WE'VE EXPLAINED, REALLY CLUSTERED IN THE ELDERLY AND SORT OF VULNERABLE POPULATIONS RATHER THAN SPREAD OUT COMMUNITY WIDE.

THE COURT: BUT YOU WOULD CONCEDE THAT EVEN FOR THE LESS VULNERABLE POPULATIONS, THEY DO SOMETIMES SUFFER SERIOUS EFFECTS FOLLOWING A CORONAVIRUS INFECTION?

MR. DUNN: I MEAN, THERE'S NO SUCH THING AS A PERSON WHO'S COMPLETELY INVULNERABLE EX-ANTE. YOU CAN'T PREDICT WHO WILL AND WHO WON'T GET SICK.

BUT THE STATISTICS ARE PRETTY CLEAR THAT THE YOUNG ARE FAR LESS AT RISK OF COVID THAN THEY ARE FOR INFLUENZA. MORE KIDS HAVE DIED OF THE FLU THIS YEAR THAN OF COVID-19.

SO, YOU KNOW, LIKE I SAID, THERE'S NO WAY TO SAY A YOUNG PERSON IS ABSOLUTELY INVULNERABLE TO IT, BUT STATISTICALLY SPEAKING, THEY'RE NOT AT RISK.

THE COURT: LET ME ASK, HOW DO YOU ALL WANT TO PROCEED? I'M ASSUMING THAT YOU WANT TO APPEAL. IS THAT RIGHT, MR. DUNN? SO DO WE NEED TO CONTINUE WITH, LIKE, NORMAL CASE MANAGEMENT WITH THIS CASE OF GOING THROUGH DISCOVERY AND SUMMARY JUDGMENT AND SETTING A TRIAL? OR ARE YOU ALL GOING TO REQUEST A STAY SO YOU CAN TAKE THIS UP ON APPEAL?

WHAT'S YOUR THINKING, ON BOTH SIDES, ABOUT HOW THIS CASE SHOULD PROCEED?

MR. DUNN: WELL, IT DEPENDS ON WHAT YOUR HONOR DOES IN THIS RULING.

BUT, I MEAN, I THINK FROM OUR PERSPECTIVE, WE WOULD CERTAINLY APPEAL THE DENIAL OF ANY P.I., OR A PARTIAL DENIAL WE'D HAVE TO EVALUATE.

THE COURT: UM-HUM.

MR. DUNN: BUT, I MEAN, WE THINK IT COULD BE EXTREMELY VALUABLE TO HAVE AN EVIDENTIARY HEARING WITH THE EXPERTS PRESENT. I THINK THAT'S SOMETHING THAT COULD SHED LIGHT ON A SUMMARY JUDGMENT RULING.

I MEAN, IF WE THOUGHT THE BLUEPRINT WAS GOING TO GO AWAY IN A COUPLE MONTHS, THAT MIGHT NOT BE NECESSARY. BUT AT THIS POINT IT LOOKS LIKE THE STATE COULD MAINTAIN THESE TYPES OF RESTRICTIONS, YOU KNOW, GOING FORWARD, AND WE'VE ALREADY HAD

ONE OF OUR CLIENTS LOSE THEIR BUSINESS, AND OTHERS MAY LOSE THEM SOON.

SO I THINK, YOU KNOW, WE'RE GOING TO KEEP PRESSING.

MS. HADDAD: YOUR HONOR, I WOULD -- I JUST WANT TO RESPOND TO ONE POINT THAT MR. DUNN MADE IN ANSWER TO YOUR PREVIOUS QUESTION.

REGARDING TARGETED RESTRICTIONS OF NURSING HOMES AND LONG-TERM CARE FACILITIES, AS DR. KURTZ DESCRIBES IN HER DECLARATION, THOSE MEASURES WERE IMPLEMENTED, BEGAN BEING IMPLEMENTED IN THE STATE -- BY THE STATE IN JANUARY OF 2020 WHEN WE FIRST LEARNED OF THE THREAT.

BUT ALSO, DR. RUTHERFORD, DR. STOTO, AND DR. WATT HAVE ALL SAID THAT THE RISK OF COVID-19 IS NOT JUST FOR THOSE WHO LIVE IN LONG-TERM CARE FACILITIES AS YOU NOTED, AND THAT ONLY, ONLY IMPLEMENTING TARGETED RESTRICTIONS IS IMPOSSIBLE. IT WOULD NOT STOP THE SPREAD OF THE VIRUS AND IT WOULD NOT STOP THE DEATHS AND THE HOSPITALIZATIONS THAT THE STATE WANTS TO AVOID.

REGARDING WHAT -- REGARDING CASE MANAGEMENT, IF YOUR HONOR ISSUES AGAINST THE STATE, I THINK WE WOULD CERTAINLY APPEAL, AND WE WOULD HAVE TO EVALUATE WHETHER, WHETHER OR NOT TO SEEK A STAY.

THE COURT: OKAY. ALL RIGHT.

DOES THE COUNTY WANT TO BE HEARD ON THIS POINT ABOUT HOW THIS CASE SHOULD PROCEED?

MR. BUSSEY: YEAH. I WOULD SAY THAT WE AGREE WITH

THE STATE AND ADD ONE OTHER POINT, WHICH IS THAT IF THE COURT IS INCLINED TO ISSUE ANY TYPE OF INJUNCTION, PARTICULARLY IF IT WOULD BE ONE THAT COULD IMPACT THE CURRENT ORDERS AS OPPOSED TO THE ONES THAT WERE IN PLACE IN OCTOBER, WE WOULD -- WE WOULD ASK THAT IT NOT GO INTO EFFECT IMMEDIATELY SO THAT WE COULD HAVE TIME TO MAKE ANY CHANGES THAT WE NEED TO THE ORDERS TO SURVIVE WHATEVER TEST THE COURT LAYS OUT IN ITS ORDER.

IF, FOR EXAMPLE, WE END UP IN A SITUATION WHERE THE COURT DETERMINES THAT GATHERINGS CAN'T BE RESTRICTED AT A CERTAIN LEVEL UNLESS SOMETHING OTHER THAN GATHERINGS IS EQUALLY RESTRICTED, THE COUNTY MIGHT RESPOND TO THAT, OR LIKELY WOULD RESPOND TO THAT BY RATCHETING UP THE RESTRICTIONS ON THOSE OTHER THINGS RATHER THAN RATCHETING DOWN THE RESTRICTIONS ON GATHERINGS BECAUSE WE REALLY ARE NOT IN A SITUATION WHERE WE CAN AFFORD TO HAVE PEOPLE CONGREGATING RIGHT NOW.

THE COURT: ALL RIGHT.

WELL, THIS IS WHAT I'D LIKE TO DO: WELL, FIRST OF ALL, I'M GOING TO THANK YOU FOR YOUR PATIENCE. WE'VE BEEN GOING ABOUT AN HOUR AND TEN MINUTES. I'D LIKE TO TAKE JUST A BRIEF BREAK AND THEN JUST COME BACK AND I THINK IT'LL ONLY BE A FEW MINUTES HOPEFULLY WHEN WE COME BACK. ALL RIGHT?

SO LET'S JUST TAKE A BRIEF BREAK NOW. THANK YOU SO MUCH.

THE CLERK: THANK YOU. WE'RE IN RECESS.

(RECESS FROM 3:44 P.M. UNTIL 3:52 P.M.)

THE COURT: ALL RIGHT. WELCOME BACK.

I JUST HAVE ONE LAST QUESTION, AND THAT IS FOR MR. DUNN. I WOULD LIKE YOU TO RESPOND TO MR. BUSSEY --

IS IT BUSSEY OR BUSSEY? BUSSEY?

MR. BUSSEY: BUSSEY, YOUR HONOR.

THE COURT: OKAY.

-- TO MR. BUSSEY'S POINT THAT IF YOU MAKE AN EXCEPTION FOR IN-HOME WORSHIP GATHERINGS, THAT DURING THIS HOLIDAY SEASON, BASICALLY THAT CAN ENCOMPASS EVERY SINGLE IN-HOME GATHERING BECAUSE THERE MAY BE SOME RELIGIOUS ASPECT TO EVERY GATHERING THAT WE'RE ANTICIPATING HAVING OVER THE NEXT COUPLE WEEKS.

WHAT'S YOUR RESPONSE TO THAT?

MR. DUNN: I DON'T THINK THERE'S ANY REASON THAT THAT WOULD NEED TO BE THE CASE. I MEAN, OUR VIEW IS THAT WE'RE TALKING ABOUT GATHERINGS WHERE THE PRIMARY PURPOSE OF THE GATHERING IS RELIGIOUS.

SO WE RECOGNIZE, YOU KNOW, YOU COULD TRY TO SNEAK YOUR WAY THROUGH THAT -- AND PEOPLE ARE PRESUMABLY TRYING ALL SORTS OF WAYS TO GET AROUND THE GATHERING BANS NOW -- BUT OUR VIEW IS THAT THE EXCEPTION THAT WE'RE LOOKING FOR, THE INJUNCTION THAT WE'RE LOOKING FOR WOULD APPLY TO THE GATHERINGS WHERE THE PRIMARY PURPOSE IS RELIGIOUS, AND SPECIFICALLY I THINK GATHERINGS WHERE THERE HAS BEEN A HISTORY OF HAVING THOSE TYPES OF GATHERINGS. THOSE WOULD BE THE MOST OBVIOUS CANDIDATES FOR IT.

JUST GATHERING FOR THE SUPER BOWL AND PRAYING FOR THE

49ERS DOES NOT CONVERT THAT TO A RELIGIOUS GATHERING. YOU KNOW, MAYBE MORE PEOPLE SHOULD HAVE DONE THAT LAST YEAR.

SO THAT'S OUR VIEW.

IN TERMS OF HOW THAT'S ENFORCED ON THE GROUND, I THINK THE COUNTY HAS TO DEAL WITH THIS ALL THE TIME WHERE IT'S HAVING TO DEAL WITH FOLKS WHO ARE CLAIMING THAT IT'S A PROTEST WHEN REALLY IT'S A BLOCK PARTY, OR TRYING TO FIGURE OUT WAYS TO GET AROUND IT.

BUT IN TERMS OF ENFORCEMENT, THAT'S A SEPARATE ISSUE. WHAT WE'RE LOOKING FOR IS BASICALLY A CLEAR RULING THAT IF YOUR GATHERING'S PRIMARY PURPOSE -- IF YOU HAVE A HOUSE CHURCH, YOU HAVE A LONG-STANDING BIBLE STUDY -- THAT THAT TYPE OF FREE EXERCISE IS ALLOWED.

THE COURT: ALL RIGHT. WELL, I'M GOING TO THANK ALL OF YOU FOR YOUR PATIENCE AND YOUR FLEXIBILITY IN HAVING THIS HEARING START AT A LATER TIME, AND THANK YOU ALL VERY MUCH.

OKAY. TAKE CARE.

MR. DUNN: THANK YOU, YOUR HONOR.

MR. BUSSEY: THANK YOU, YOUR HONOR.

MS. HADDAD: THANK YOU, YOUR HONOR.

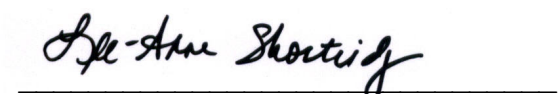
THE CLERK: COURT IS ADJOURNED.

(THE PROCEEDINGS WERE CONCLUDED AT 3:54 P.M.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF ZOOM PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JANUARY 15, 2021

Blueprint for a Safer Economy

Activity and Business Tiers

March 11, 2021

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
Critical Infrastructure	Open with modifications	Open with modifications	Open with modifications	Open with modifications
Gatherings (current posted performance limits)	Outdoor gatherings only with modifications • Max 3 households	Indoor gatherings strongly discouraged, allowed with modifications • Max 3 households	Indoor gatherings strongly discouraged, allowed with modifications • Max 3 households	Indoor gatherings strongly discouraged, allowed with modifications • Max 3 households
Limited Services	Open with modifications	Open with modifications	Open with modifications	Open with modifications
Outdoor Playgrounds & Outdoor Recreational Facilities	Open with modifications	Open with modifications	Open with modifications	Open with modifications
Hair Salons & Barbershops	Open indoors with modifications	Open indoors with modifications	Open indoors with modifications	Open indoors with modifications
All Retail (including critical infrastructure, except standalone grocers)	Open indoors with modifications • Max 25% capacity	Open indoors with modifications • Max 50% capacity	Open indoors with modifications	Open indoors with modifications

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
Shopping Centers (Malls, Destination Centers, Swap Meets)	Open indoors with modifications • Max 25% capacity • Closed common areas • Closed food courts	Open indoors with modifications • Max 50% capacity • Closed common areas • Reduced capacity food courts (see restaurants)	Open indoors with modifications • Closed common areas • Reduced capacity food courts (see restaurants)	Open indoors with modifications • Reduced capacity food courts (see restaurants)
Personal Care Services	Open indoors with modifications	Open indoors with modifications	Open indoors with modifications	Open indoors with modifications
Museums, Zoos, and Aquariums	Outdoor only with modifications	Open indoors with modifications • Indoor activities max 25% capacity	Open indoors with modifications • Indoor activities max 50% capacity	Open indoors with modifications
Places of Worship	• Outdoor encouraged • Indoor strongly discouraged, allowed with modifications • Max 25% capacity	Open indoors with modifications • Max 25% capacity	Open indoors with modifications • Max 50% capacity	Open indoors with modifications • Max 50% capacity
Movie Theaters	Outdoor only with modifications	Open indoors with modifications • Max 25% capacity or 100 people, whichever is fewer	Open indoors with modifications • Max 50% capacity or 200 people, whichever is fewer	Open indoors with modifications • Max 50% capacity

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
Hotels and Lodging	Open with modifications	Open with modifications • +Fitness centers (+10%)	Open with modifications • +Fitness centers (+25%) • +Indoor pools	Open with modifications • +Fitness Centers (50%) • +Spa facilities etc.
Gyms and Fitness Centers	Outdoor only with modifications	Open indoors with modifications • Max 10% capacity • +Climbing walls	Open indoors with modifications • Max 25% capacity • +Indoor pools	Open indoors with modifications • Max 50% capacity • +Saunas • +Steam rooms
Restaurants	Outdoor only with modifications	Open indoors with modifications • Max 25% capacity or 100 people, whichever is fewer	Open indoors with modifications • Max 50% capacity or 200 people, whichever is fewer	Open indoors with modifications • Max 50% capacity
Wineries, Breweries and Distilleries* **	**Effective March 13, 2021:** Outdoor only with modifications • Reservations • 90-minute time limit • Seating/tables only • Limited hours (service for on-site consumption closed by 8 pm)	**Effective March 13, 2021:** Outdoor only with modifications • Reservations • 90-minute time limit • Seating/tables only • Limited hours (service for on-site consumption closed by 8 pm)	**Effective March 13, 2021:** Open indoors with modifications • Max 25% capacity indoors, or 100 people, whichever is fewer	**Effective March 13, 2021:** Open indoors with modifications • Max 50% capacity or 200 people indoors, whichever is fewer

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
Bars (where no meal provided; follow restaurant guidance where meal is provided)	Closed	Closed	Open outdoors with modifications	**Effective March 13, 2021:** Open indoors with modifications • Max 25% capacity indoors, or 100 people, whichever is fewer
Family Entertainment Centers	Outdoor only with modifications e.g. • Kart Racing • Mini Golf • Batting Cages	Outdoor only with modifications e.g. • Kart Racing • Mini Golf • Batting Cages	Open indoors for naturally distanced activities with modifications • Max 25% capacity • Bowling Alleys	Open indoors for activities with increased risk of proximity and mixing with modifications • Max 50% capacity • Arcade Games • Ice and roller skating • Indoor playgrounds
Cardrooms, Satellite Wagering	Outdoor only with modifications	Outdoor only with modifications	Open indoors with modifications • Max 25% capacity	Open indoors with modifications • Max 50% capacity
Offices	Remote	Remote	Open indoors with modifications • Encourage telework	Open indoors with modifications • Encourage telework

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
Outdoor Live Events with Assigned Seats and Controlled Mixing (e.g., sports and live performances)* **Indoor guidance forthcoming**	**Current:** Open with modifications, no live audiences **Effective April 1, 2021:** • 100 people or fewer • Regional visitors (120 miles) • Advanced reservations only • No concessions or concourse sales	**Current:** Open with modifications, no live audiences **Effective April 1, 2021:** • Max 20%, includes suites with 25% occupancy per suite and suites no more than 3 households • Weekly worker testing program • In-state visitors only, check for current CDPH Travel Advisory in effect • Advanced reservations only • Primarily in-seat concessions (no concourse sales)	**Current:** • Open with modifications • Permanent venues with live audiences outdoors only • Capacity must be limited to 20% • Reservations required • Assigned seating only • In-seat concessions only (no concourse sales) • Regional attendees only (within 120 miles) **Effective April 1, 2021:** • Max 33%, includes suites with 25% occupancy per suite • Weekly worker testing program • In-state visitors only, check for current CDPH Travel Advisory in effect	**Current:** • Open with modifications • Permanent venues with live audiences outdoors only • Capacity must be limited to 25% • Reservations required • Assigned seating only • In-seat concessions only (no concourse sales) • Regional attendees only (within 120 miles) **Effective April 1, 2021:** • Max 67%, includes suites with 25% occupancy per suite • In-state visitors only, check for current CDPH Travel Advisory in effect • Primarily in-seat concessions (no concourse sales)

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
			• Primarily in-seat concessions (no concourse sales) • Max 67% if all guests are tested or show proof of full vaccination	
Amusement Parks**	**Current:** Closed **Effective April 1, 2021:** Closed	**Current:** Closed **Effective April 1, 2021:** • Max 15% • Small Groups - Max 10 people or 3 household groups with no intergroup mixing • Indoor capacity max 15% with time restrictions • No indoor dining • Weekly worker testing program • In-state visitors only, check for current CDPH Travel Advisory in effect • Online ticket purchases only	**Current:** • Smaller parks can open with modifications • Capacity must be limited to 25% or 500 people, whichever is less • Outdoor attractions only can open • Reservations or advanced ticket sales required • Local attendees only (from the same county as the park's location) **Effective April 1, 2021:** • Max 25% • Indoor capacity max 25% with time restrictions	**Current:** • Larger parks can open with modifications • Park capacity must be limited to 25% • Reservations or advanced ticket sales required **Effective April 1, 2021:** • Max 35% • Indoor capacity max 25% with time restrictions • Weekly worker testing program • With other modifications • In-state visitors only, check for current CDPH Travel Advisory in effect

SECTORS	Tier 1 Widespread (Case Rate >7 and Test Positivity >8%)	Tier 2 Substantial (Case Rate 4-7 and Test Positivity 5-8%)	Tier 3 Moderate (Case Rate 1-3.9 and Test Positivity 2-4.9%)	Tier 4 Minimal (Case Rate <1 and Test Positivity <2%)
Post 2 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 4-10**	**CR 1-3.9**	**CR <1**
Post 4 million doses administered in first Healthy Places Index quartile	**CR >10**	**CR 6-10**	**CR 2-5.9**	**CR <2**
			• Weekly worker testing program • With other modifications • In-state visitors only, check for current CDPH Travel Advisory in effect	
Overnight Sleepaway Camps****	Closed	**Effective June 1, 2021:** Open with modifications	**Effective June 1, 2021:** Open with modifications	**Effective June 1, 2021:** Open with modifications

Updated on March 11, 2021:
***Effective March 13, 2021.
****Regardless of trigger being met, these activities (overnight sleepaway camps) cannot begin any sooner than June 1, 2021.

Updated on March 5, 2021:
*Regardless of trigger being met, these activities (outdoor live events) cannot begin any sooner than April 1, 2021.
**Regardless of trigger being met, these activities (amusement parks) cannot begin any sooner than April 1, 2021.

State of California—Health and Human Services Agency
California Department of Public Health

Sandra Shewry
Acting Director
Erica S. Pan, MD, MPH
Acting State Health Officer

GAVIN NEWSOM
Governor

November 13, 2020

TO: All Californians

SUBJECT: CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings

Summary

This guidance provides an updated plan for Californians to gather outside their household and replaces the March 16, 2020, October 9, 2020 and other prior gatherings guidance. It applies to private gatherings, and all other gatherings not covered by existing sector guidance are prohibited. It also applies to activities protected by the First Amendment to the extent that they are not already permitted by other guidance, notwithstanding any guidance, orders, or directives to the contrary. Gatherings are defined as social situations that bring together people from different households at the same time in a single space or place. When people from different households mix, this increases the risk of transmission of COVID-19.

Context

COVID-19 continues to pose a severe risk to communities and requires all people in California to follow necessary precautions and to adapt the way they live and function in light of this ongoing risk. The safest way to gather is to spend time with people in the same household, gather virtually, or gather outdoors.

The season of cold weather has now arrived in many parts of the state, and rainy season is imminent, making it more difficult to gather outdoors. Because of this, many people in California may feel the need to gather indoors instead. Indoor gatherings remain risky activities, and it would always be safer to gather outdoors or virtually whenever possible. But this guidance explains some important and necessary steps to make indoor gatherings less risky if they do occur.

In general, the more people from different households a person interacts with at a gathering, the closer the physical interaction is, and the longer the interaction lasts, the higher the risk that a person with a COVID-19 infection, symptomatic or asymptomatic, may spread it to others. Public health studies have also shown that the risk of transmission is increased in indoor spaces, particularly when there isn't appropriate ventilation. [1] Unlike indoor spaces, wind and air in outdoor spaces can help reduce spread of the virus from one person to another.

Planning scenarios published by the CDC estimate that, on average, a person with COVID-19 goes on to infect between 2-4 people, with a best estimate of 2.5 when there are no preventive measures.[2] For example, if each infected person spreads the virus to two people, who in turn spread it to two others each; those four will spread the virus to eight others; those eight will spread the virus to 16; and so on. As a result, after 10 transmission cycles, one person could be responsible for 1,024 other people contracting the virus.[3] Additionally, there is broad agreement that people who are not experiencing symptoms can still spread COVID-19[4].The fact that COVID-19 can be spread by people who don't have symptoms or aren't showing symptoms yet is one of the aspects of the COVID-19 that makes it difficult to control.

All gatherings pose a higher risk of transmission and spread of COVID-19 when people mix from different households and communities. The likelihood of transmission and spread increases with laughing, singing, loud talking and difficulty maintaining physical distance. Limiting attendance at gatherings is a way to reduce the risk of spread as it lowers the number of different people who are interacting. Additionally, by limiting attendance there is an improved ability to perform effective contact tracing if there is a positive case discovered, which can help to slow the spread of COVID-19[5]. People who do choose to attend gatherings should discuss and agree upon the specific group rules before convening together.

Like other types of activities, activities protected by the First Amendment pose risks of COVID-19 transmission. People who wish to engage in political, artistic, or other forms of expression or in religious expression and practice are strongly encouraged to find means of expression that do not involve in-person gatherings or to wait to gather in person until those activities are permitted by the Blueprint for a Safer Economy. However, because this guidance offers safer ways to operate in the colder climate, with higher likelihood of rain, associated with the time of year we now enter, the safeguards in this guidance apply as well to activities protected by the First Amendment and those activities are not prohibited if conducted in accordance with this guidance.

Recommendations & Mandatory Requirements for All Gatherings

All persons planning to host or participate in a private gathering, as defined above, must comply with the requirements identified below and are strongly encouraged to follow the recommendations as well. Activities protected by the First Amendment may proceed under this guidance notwithstanding any guidance, orders, or directives to the contrary. Local health jurisdictions may be more restrictive than this guidance. Refer to your local guidance for what is allowed in your area.

1. Attendance

a. Gatherings that include more than 3 households are prohibited. This includes everyone present, including hosts and guests. Remember, the smaller the number of people, the safer.

b. Keep the households that you interact with stable over time. By spending time with the same people, risk of transmission is reduced. Participating in multiple gatherings with different households or groups is strongly discouraged.

c. The host should collect names of all attendees and contact information in case contact tracing is needed later.

2. Location: Gatherings Must be Outdoors for Counties in the Purple Tier

a. Gatherings that occur outdoors are significantly safer than indoor gatherings. All gatherings must be held outside in the Purple Tier, and indoor gatherings are strongly discouraged in Red, Orange and Yellow Tiers.

i. If gathering indoors, increase fresh air circulation by opening windows or doors, as much as possible, especially in the rooms where people are gathering.

b. A gathering of no more than three households is permitted in a public park or other outdoor space, even if unrelated gatherings of other groups up to three households are also occurring in the same park or other outdoor space. If multiple such gatherings are occurring, mixing between groups gatherings is not allowed. Additionally, multiple gatherings of three households cannot be jointly organized or coordinated to occur in the same public park or other outdoor space at the same time – this would constitute a gathering exceeding the permitted household limits.

3. Don't Attend Gatherings If You Feel Sick

a. Anyone with any COVID-19-like symptoms (fever, cough, shortness of breath, chills, night sweats, sore throat, nausea, vomiting, diarrhea, tiredness, muscle or body aches, headaches, confusion, or loss of sense of taste/smell), must stay home and not come into contact with anyone outside their household.

b. Anyone who develops COVID-19 within 48 hours after attending a gathering should notify the organizer of the gathering and/or other attendees as soon as possible regarding the potential exposure.

4. Individuals in a High-Risk Group are Discouraged from Attending any Gatherings

a. People at higher risk of severe illness or death from COVID-19 (such as older adults and people with chronic medical conditions) are strongly urged not to attend any gatherings, especially indoor gatherings.

b. If higher-risk individuals do attend any gatherings, they should do the following to decrease the risk for exposure:

i. Spend as much time outside, or near outside air flow such as open windows or doors, as possible.

ii. Wear a respirator or surgical mask instead of a cloth mask, and minimize any time at the event with the mask off.

iii. Remain at least six feet, or ideally even farther away, from others outside their household as much as possible, especially when people are eating or drinking without face coverings.

iv. Spend a shorter time at the gathering than others to reduce potential exposure.

5. Practice Physical Distancing and Hand Hygiene at Gatherings

a. For any gatherings permitted under this guidance, the space must be large enough so that everyone at a gathering can maintain at least a 6-foot physical distance from others (not including their own household) at all times.

b. Seating must provide at least 6 feet of distance (in all directions—front-to-back and side-to-side) between different households.

c. Everyone at a gathering should frequently wash their hands with soap and water, or use hand sanitizer if soap and water are not available.

d. Shared items should be minimized during a gathering. Food and beverages should be served by a person who washes or sanitizes their hands frequently, and who must wear a face covering. Self-serve items from communal containers should be minimized.

e. Remind all persons to sanitize hands before eating or drinking, and after touching shared items if shared items are unavoidable.

6. Wear a Face Covering to Keep COVID-19 from Spreading

a. When gathering, face coverings must be worn in accordance with the CDPH Guidance on the Use of Face Coverings, unless an exemption is applicable.

b. People at gatherings are advised to limit removal of their face coverings to when they are actively eating or drinking. While face coverings are removed for this purpose, they should stay at least 6 feet away from everyone outside their own household, and put their face covering back on as soon as they are done with the activity.

c. Face coverings can also be removed to meet urgent medical needs (for example, to use an asthma inhaler, take medication, or if feeling light-headed).

7. Keep it short

a. Gatherings should be two hours or less. The longer the duration, the risk of transmission increases.

8. Singing, Chanting, Shouting, Cheering and Similar Activities Are Strongly Discouraged at Outdoor Gatherings and Prohibited at Indoor Gatherings

a. Singing, chanting, shouting, cheering, physical exertion, and similar activities significantly increase the risk of COVID-19 transmission because these activities increase the release of respiratory droplets and fine aerosols into the air. Because of this, singing, chanting, shouting, cheering, and similar activities are strongly discouraged in outdoor settings, but if they occur, the following rules and recommendations apply:

i. All people who are singing, chanting, shouting, cheering, or engaging in similar activities should wear a face covering at all times while engaging in those activities, including anyone who is leading a song, chant, or cheer. Because these activities pose a very high risk of COVID-19 transmission, face coverings are essential to reduce the spread of respiratory droplets and fine aerosols;

ii. People who are singing, shouting, chanting, cheering, or exercising are strongly encouraged to maintain physical distancing beyond 6 feet to further reduce risk.

iii. People who are singing or chanting are strongly encouraged to do so quietly (at or below the volume of a normal speaking voice).

b. Instrumental music is allowed outdoors as long as the musicians maintain at least 6-foot physical distancing. Musicians must be from one of the three households. Playing of wind instruments (any instrument played by the mouth, such as a trumpet or clarinet) is strongly discouraged, and if played should use protective or tightly woven cloth barriers on the instrument bells or at the end of the instrument to protect from spread of

condensation droplets. If music is played, it is recommended that the volume be quiet enough that attendees can speak in a normal voice without shouting.

c. Singing, chanting, shouting, cheering, playing of wind instruments and similar activities are not permitted in indoor gatherings.

[1] See, e.g., Hiroshi Nishiura, et al., Closed environments facilitate secondary transmission of coronavirus disease 2019 (COVID-19); Hu Qian, et al., "Indoor transmission of SARS-CoV-2" [pre-print] published in medRxiv on April 4, 2020.

[2] See Planning Scenarios.

[3] See, e.g., Report 3: Natsuko Imai et al, WHO Collaborating Centre for Infectious Disease Modelling, MRC Centre for Global Infectious Disease Analysis, J-IDEA, "Imperial college London, UK. Transmissibility of 2019 -n-CoV)." See also Inglesby T B JAMA Public Health Measures and the Reproduction Number of SARS-CoV-2. JAMA Network.2020.7878 (May 1, 2020).

[4] Transmission of SARS-CoV-2: implications for infection prevention precautions.

[5] See Preventing the Spread of the Coronavirus

California Department of Public Health
PO Box, 997377, MS 0500, Sacramento, CA 95899-7377
Department Website (cdph.ca.gov)

ROBERT DUNN (SBN: 275600)
JOHN D. TRIPOLI (SBN: 262542)
EIMER STAHL LLP
99 South Almaden Boulevard, Suite 662
San Jose, CA 95113
(669) 231-8755
rdunn@eimerstahl.com
jtripoli@eimerstahl.com

RYAN J. WALSH (*pro hac vice* pending)
JOHN K. ADAMS (*pro hac vice* pending)
AMY C. MILLER (*pro hac vice* pending)
EIMER STAHL LLP
10 East Doty Street, Suite 800
Madison, WI 53703
(608) 441-5798
rwalsh@eimerstahl.com
jadams@eimerstahl.com
amiller@eimerstahl.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF CALIFORNIA

RITESH TANDON, an individual; **KAREN BUSCH**, an individual; **TERRY GANNON**, an individual; **CAROLYN GANNON**, an individual; **JEREMY WONG**, an individual; **JULIE EVARKIOU**, an individual; **DHRUV KHANNA**, an individual; **CONNIE RICHARDS**, an individual; **FRANCES BEAUDET**, an individual; and **MAYA MANSOUR**, an individual,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California;

Case No. 5:20-cv-07108-LHK

DECLARATION OF PLAINTIFF JEREMY WONG IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

XAVIER BECERRA, in his official capacity as the Attorney General of California; **SANDRA SHEWRY**, in her official capacity as the Acting State Director of the California Department of Public Health; **ERICA S. PAN**, in her official capacity as the Acting State Public Health Officer of the California Department of Public Health; **JEFFREY V. SMITH**, in his official capacity as County Executive of Santa Clara County; and **SARA H. CODY**, in her official capacity as the Health Officer and Public Health Director of Santa Clara County,

Defendants.

Jeremy Wong declares, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a resident of Santa Clara County in the State of California. I have personal knowledge of the matters set forth below and would testify competently to them if called upon to do so.

2. I am a full-time Christian minister, and, as part of my ministry, for nearly 3 years I have hosted members of my congregation in my home for communal worship, including Biblical studies, theological discussions, collective prayer, and musical praise.

3. These gatherings occurred on a weekly basis and often involved around 8 to 10 persons.

4. Since Governor Newsom, the California Department of Public Health, and Santa Clara County issued their orders barring in-person gatherings, I have not been able to host any in-person events. I cannot hold such gatherings indoors under the state's guidance because my house is not a place of worship and the state made no exemptions for in-home communal worship. Under CDPH guidance, I could not hold

these informal religious activities outdoors because they are not a "protest," "cultural event," or "religious ceremony." On October 9, 2020, the state banned *all* indoor gatherings. And before October 13, 2020, Santa Clara County similarly banned all indoor gatherings.

5. These orders come at a particularly worrisome time for my religious assemblies because prayer and faith-based teachings are critical means to cope with and respond to the COVID-19 crisis. Communal worship, congregational study, and collective prayer are central tenets of my faith and ministry. These types of in-person gatherings are impossible to replicate in an online format. An online or virtual sermon cannot replicate God's presence among an assembled church. In-person worship is indispensable. The Bible commands us to do certain activities such as singing and gathering in person. Every description of the church in the New Testament is that of a physically gathered people. Not only are such things irreplaceable by virtual options, but it is a matter of obedience to the Word of God.

6. If allowed to do so, I could hold communal gatherings in a way that protects my guests. I have access to large outdoor spaces at my home. For example, I could hold an in-person gathering in my backyard where attendees could socially distance by more than six feet. They would also wear masks, gloves, screens, or other devices to protect and inhibit the spread of COVID-19 and would have access to hand-washing locations or hand sanitizer. To further secure against infection, we will also use virus-killing chemicals in shared spaces. I would also require that anyone who is sick or has symptoms to stay at home. These mitigation measures have been approved and recommended by the CDC and CDPH. I could similarly host safe gatherings indoors at my house—in smaller numbers—using social distancing, mask wearing, and aggressive sanitizing.

7. If the ban on gatherings were lifted, I would once again host these communal worship and study events.

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the foregoing is true and correct to the best of my knowledge.

Date: October 19, 2020

By: _____
Jeremy Wong

ROBERT DUNN (SBN: 275600)
JOHN D. TRIPOLI (SBN: 262542)
EIMER STAHL LLP
99 South Almaden Boulevard, Suite 662
San Jose, CA 95113
(669) 231-8755
rdunn@eimerstahl.com
jtripoli@eimerstahl.com

RYAN J. WALSH (*pro hac vice* pending)
JOHN K. ADAMS (*pro hac vice* pending)
AMY C. MILLER (*pro hac vice* pending)
EIMER STAHL LLP
10 East Doty Street, Suite 800
Madison, WI 53703
(608) 441-5798
rwalsh@eimerstahl.com
jadams@eimerstahl.com
amiller@eimerstahl.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR

NORTHERN DISTRICT OF CALIFORNIA

RITESH TANDON, an individual;
KAREN BUSCH, an individual;
TERRY GANNON, an individual;
CAROLYN GANNON, an individual;
JEREMY WONG, an individual;
JULIE EVARKIOU, an individual;
DHRUV KHANNA, an individual;
CONNIE RICHARDS, an individual;
FRANCES BEAUDET, an individual;
and **MAYA MANSOUR** an individual,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California;

Case No. 5:20-cv-07108-LHK

DECLARATION OF PLAINTIFF KAREN BUSCH IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

1

XAVIER BECERRA, in his official capacity as the Attorney General of California; **SANDRA SHEWRY**, in her official capacity as the Acting State Director of the California Department of Public Health; **ERICA S. PAN**, in her official capacity as the Acting State Public Health Officer of the California Department of Public Health; **JEFFREY V. SMITH**, in his official capacity as County Executive of Santa Clara County; and **SARA H. CODY**, in her official capacity as the Health Officer and Public Health Director of Santa Clara County,

Defendants.

Karen Busch declares, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a resident of Santa Clara County in the State of California. I have personal knowledge of the matters set forth below and would testify competently to them if called upon to do so.

2. For over 2 years I have hosted Bible study gatherings in my home, which included faith-based discussions and collective prayer.

3. These gatherings occurred on a rotational basis among the Bible study group members every two weeks. The group included 6 couples (total of 12 persons).

4. Since Governor Newsom, the California Department of Public Health, and Santa Clara County issued their orders barring in-person gatherings, I have not been able to host any in-person events. These orders come at a particularly worrisome time for my religious assemblies because prayer and faith-based teachings are critical means for my Bible study group to cope with and respond to the COVID-19 crisis. Yet because of the various state and county regulations, I am unable to worship in the privacy of my home with other people outside of my immediate family. Under CDPH

guidance, I am not even able to hold worship and study activities outdoors because they are not a "protest," "cultural event," or "religious ceremony." I wish to hold my meetings indoors whenever needed due to weather. But on October 9, 2020, the state banned all indoor gatherings. And before October 13, 2020, Santa Clara County similarly banned all indoor gatherings.

5. Communal worship, congregational study, and collective prayer are central tenets of my faith. These types of in-person gatherings are impossible to replicate in an online format. An online or virtual sermon cannot replicate God's presence among an assembled church. In-person worship is indispensable. Several members of my Bible study do not even have computers and thus cannot participate in an online format and are only able to phone in to the session.

6. If allowed to do so, I could hold Bible study and communal worship gatherings in a way that protects my guests. Group members could wear masks to protect and inhibit the spread of COVID-19 and would have access to hand-washing locations or hand sanitizer. To further secure against infection, we will also use virus-killing chemicals in shared spaces. I would also require that anyone who is sick or has symptoms to stay at home. These mitigation measures have been approved and recommended by the CDC and CDPH. We are able to fly in an airplane within inches of another person for 10 hours so I feel comfortable sharing my home for 2 hours with a select group of known people that would facilitate contract tracing should it ever be necessary.

7. If the ban on gatherings were lifted, I would once again host these communal worship and Bible study events to better inform me and my peers on our shared faith.

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the foregoing is true and correct to the best of my knowledge.

Date: October 19, 2020

By: 
Karen Busch

No. 21-15228

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RITESH TANDON, ET AL,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, ET AL,

Defendants-Appellees.

DECLARATION OF PLAINTIFF-APPELLANT JEREMY WONG IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

RYAN J. WALSH
JOHN K. ADAMS
AMY C. MILLER
EIMER STAHL LLP
10 East Doty Street, Suite 800
Madison, WI 53703
(608) 441-5798

ROBERT E. DUNN
JOHN D. TRIPOLI
EIMER STAHL LLP
99 South Almaden Blvd.,
Suite 641
San Jose, CA 95113
(408) 889-1690

Counsel for Plaintiffs-Appellants

Jeremy Wong declares, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a resident of Santa Clara County in the State of California. I have personal knowledge of the matters set forth below.

2. I am a full-time Christian minister, and, as part of my ministry, for nearly 3 years I have hosted members of my congregation in my home for communal worship, including Biblical studies, theological discussions, collective prayer, and musical praise. These gatherings occurred on a weekly basis and often involved around 8 to 10 persons.

3. Since Governor Newsom, the California Department of Public Health, and Santa Clara County issued their orders barring in-person gatherings, I have not been able to host any in-person events. I cannot hold such gatherings indoors under the state's guidance because my house is not a place of worship and the state made no exemptions for in-home communal worship.

4. Even after nearly a year of government orders, changes in scientific knowledge, treatment, and vaccination for COVID-19, the State and County orders still prevent me from hosting these in-person events with more than three households.

5. If the ban were lifted, I would once again host these communal worship and religious study events. I could hold these events in a way that protects my guests, including through the use of outdoor space, social distancing, mask wearing, sanitization of shared spaces, handwashing and hand sanitizer. I would also require that

anyone who is sick or has symptoms to stay at home. These mitigation measures have been approved and recommended by the CDC and CDPH.

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the foregoing is true and correct to the best of my knowledge.

Date: March 2, 2021

By: _____

Jeremy Worg

No. 21-15228

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RITESH TANDON, ET AL,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, ET AL,

Defendants-Appellees.

DECLARATION OF PLAINTIFF-APPELLANT KAREN BUSCH IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

RYAN J. WALSH
JOHN K. ADAMS
AMY C. MILLER
EIMER STAHL LLP
10 East Doty Street, Suite 800
Madison, WI 53703
(608) 441-5798

ROBERT E. DUNN
JOHN D. TRIPOLI
EIMER STAHL LLP
99 South Almaden Blvd.,
Suite 641
San Jose, CA 95113
(408) 889-1690

Counsel for Plaintiffs-Appellants

Karen Busch declares, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a resident of Santa Clara County in the State of California. I have personal knowledge of the matters set forth below.

2. For over 2 years I hosted Bible study gatherings in my home, which included faith-based discussions and collective prayer. These gatherings occurred on a rotational basis among the Bible study group members every two weeks. The group included 6 couples (total of 12 persons).

3. Since Governor Newsom, the California Department of Public Health, and Santa Clara County issued their orders barring in-person gatherings, I have not been able to host any in-person events.

4. Even after nearly a year of government orders, changes in scientific knowledge, treatment, and vaccination for COVID-19, the State and County orders still prevent me from hosting these in-person events with more than three households.

5. If the ban on gatherings were lifted, I would once again host these Bible study events. I could hold these events in a way that protects my guests, including through the use of mask wearing, sanitization of shared spaces, handwashing and hand sanitizer. I would also require that anyone who is sick or has symptoms to stay at home. These mitigation measures have been approved and recommended by the CDC and CDPH.

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the foregoing is true and correct to the best of my knowledge.

Date: March 2, 2021

By: 

Karen Busch