20-55533

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTH BAY UNITED PENTECOSTAL CHURCH; et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

No. 3:20-cv-00865-BAS-AHG
The Honorable Cynthia A. Bashant, District Judge

STATE DEFENDANTS-APPELLEES' ANSWERING BRIEF

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COURT RULES

INTRODUCTION

Events have outrun the order on appeal. When Plaintiffs sought a temporary restraining order, the State was still in the early stages of its response to the COVID-19 pandemic and had prohibited all in-person gatherings, including worship services (though not online or drive-in services). Since then, the State has loosened these restrictions, and Californians may now congregate for indoor, in-person worship services in groups of up to 100 people or 25% building capacity (whichever is lower), or outdoors with no attendance limit, provided distancing and other precautions are taken. Especially as Plaintiffs have not amended their operative complaint or presented any evidence that the loosened restrictions harm them, the order denying their request to enjoin the earlier restrictions on worship services is now moot.

If the Court nonetheless reaches the merits of this appeal, it should affirm the denial of a TRO for three reasons. *First*, because the operative guidelines permit in-person worship services subject to attendance restrictions for indoor services, and Plaintiffs have not presented any evidence that these restrictions harm them, they have not satisfied the threshold requirement of irreparable injury.

Second, Plaintiffs have not shown a likelihood of success on the merits. The novel coronavirus that causes COVID-19 poses an acute risk of transmission at large public gatherings such as indoor, in-person worship services, and unfortunate

instances in which such services have become "super-spreader" events abound. As the Chief Justice of the Supreme Court recently explained in rejecting Plaintiffs' prior request to enjoin the guidelines at issue here, the restrictions on in-person worship services do not violate the Free Exercise Clause because they are consistent with the similar or more severe restrictions imposed on comparable secular gatherings. *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in denial of injunctive relief). In addition, because "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic" is properly left to "politically accountable officials" entrusted to guard and protect public health, *id.*, the restrictions survive any applicable level of scrutiny.

Third, given the serious public health risks involved, the balance of equities and the public interest weigh decisively against the equitable relief Plaintiffs seek. To the extent that Plaintiffs have suffered any injury from the attendance restrictions imposed on indoor, in-person worship services, that injury is limited. By contrast, the public's interest in protecting itself against the spread of COVID-19 is of the utmost significance, and the recent rise in COVID-19 infections as well as the repeated reports of outbreaks traced to reopenings of in-person worship services underscore how strong that public interest is. Thus, all relevant factors weigh against the extraordinary equitable relief sought by Plaintiffs.

This appeal should be dismissed for mootness, or, in the alternative, the district court's order denying a TRO should be affirmed.

STATEMENT OF JURISDICTION

Plaintiffs brought this action under 42 U.S.C. § 1983. Pls.' Excerpts of Record ("ER") 490. The district court has subject matter jurisdiction over Plaintiffs' federal claims, 28 U.S.C. §§ 1331, 1343(a), but not over Plaintiffs' state law claims, *Pennhurst State School & Hosp. v. Halderman* 465 U.S. 89, 106, 124-125 (1984).

This Court previously found that it had appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's denial of Plaintiffs' TRO application. Dkt. 29, at 2[1] (citing *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989)). However, in light of developments since that finding, the appeal has become moot because Plaintiffs may now worship in the way they seek to do. *See* Argument Section I, *infra*. This Court should therefore dismiss the appeal for lack of jurisdiction. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

STATEMENT OF ISSUES

1. Whether there is any live controversy over the temporary restraining order sought by Plaintiffs now that the prohibition on in-person worship services is

[1] Citations to "Dkt.__, at __," refer to this Court's docket.

no longer in effect and has been superseded by guidelines that permit in-person services.

2. Whether, now that in-person worship services are permitted, Plaintiffs have shown irreparable injury.

3. Whether Plaintiffs have demonstrated a likelihood of success on the merits of their claims under (a) the Free Exercise Clause, (b) the Due Process Clause, (c) the Equal Protection Clause, and (d) the free religious exercise provision of the California Constitution.

4. Whether the balance of equities favors equitable relief where Plaintiffs have presented little or no evidence of harm and the relief sought may undermine the State's efforts to slow the spread of this highly infectious and often deadly disease.

STATEMENT OF THE CASE

I. CALIFORNIA'S STAY-AT-HOME ORDER AND RELATED COVID-19 DIRECTIVES

As this Court is by now well aware, COVID-19 is a highly transmissible and often fatal disease, which to date has infected nearly 9.5 million people and caused almost half-a-million deaths worldwide,[2] including more than 2.3 million

[2] Coronavirus disease 2019 (COVID-19) Situation Report 158, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200626-covid-19-sitrep-158.pdf?sfvrsn=1d1aae8a_2 (last accessed June 26, 2020).

infections and over 120,000 deaths in the United States.[3] The novel coronavirus that causes COVID-19 spreads through respiratory droplets that remain in the air or on surfaces, and it may be transmitted unwittingly by individuals who exhibit no symptoms. *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). There is no known cure, no widely effective treatment, and no vaccine for this novel disease. *Id.* As a consequence, measures such as physical distancing that limit physical contact are the only widely recognized way to slow the virus's spread. ER 32, 125. Although California has made significant progress in doing so, to date COVID-19 already has taken a devastating toll on the State, with more than 200,000 infections and 5,800 deaths.[4]

California responded early and decisively to the threat posed by COVID-19. As early as December 2019, the State began working closely with the national Centers for Disease Control and Prevention (CDC), the United States Health and Human Services Agency, and local health departments to monitor and plan for the potential spread of COVID-19. ER 533. The California Department of Public Health also has been in regular communication with hospitals, clinics, and other

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[3] Cases in U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last accessed June 26, 2020).

[4] California COVID-19 by the Numbers, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers (last accessed June 26, 2020).

health providers and has been providing guidance to health facilities and providers regarding COVID-19. *Id.*

To prepare for and implement measures to mitigate the spread of COVID-19, the Governor proclaimed a State of Emergency in California on March 4, 2020. *Id.* This proclamation makes additional resources available, formalizes emergency state actions already underway, and helps the State prepare to combat the broader spread of the disease. *Id.*

On March 19, the Governor 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." ER 533. On March 22, the Public Health Officer designated a supplemental list of "Essential Critical Infrastructure Workers." ER 536. That list included "[f]aith based services that are provided through streaming or other technology," which has been updated as "[c]lergy for essential support and faith-based services that are provided through streaming or other technologies that support physical distancing and state public health guidelines." ER 499, 551. This provision permitted places of worship to conduct services over online streaming or teleconferencing and via drive-ins, but not in person. ER 75; *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at *3 n.2 (E.D. Cal. May 5, 2020).

San Diego County, where Plaintiffs' church is located, issued similar directives. ER 589.

II. THE APRIL 28, 2020 RESILIENCE ROADMAP

On April 28, 2020, the Governor announced a "Resilience Roadmap" to guide the gradual and safe reopening of the State. ER 101, 115. The Roadmap had four stages: safety and preparation (Stage 1); reopening of lower-risk workplaces and spaces (Stage 2); reopening of higher-risk workplaces and spaces (Stage 3); and an end to the Stay-at-Home Order (Stage 4). *Id.* To implement the Roadmap, on May 4, 2020, the Governor issued Executive Order N-60-20, requiring California residents to continue complying with the Stay-at-Home Order and the State Public Health Officer to establish criteria and procedures for qualifying local jurisdictions to move more quickly through Stage 2 of the Roadmap. ER 444. At first, religious services were included in Stage 3. ER 116.

III. THE PROCEEDINGS BELOW

A. Plaintiffs' Complaint

On May 8, 2020, Plaintiffs sued Governor Newsom, Attorney General Becerra, Public Health Officer Dr. Angell, as well as numerous county officials to enjoin the Stay-at-Home Order, Resilience Roadmap, and related county orders. ER 609-10. Plaintiffs, which include South Bay United Pentecostal Church and its Senior Pastor, Bishop Arthur Hodges III, allege that their sincerely and deeply held religious beliefs make it essential for them to congregate in person to worship. ER

502-05. On May 11, Plaintiffs filed the operative First Amended Complaint. ER 490.

Plaintiffs typically hold indoor religious worship services consisting of 200-300 persons per service, three to five times per day. ER 308. Plaintiffs' services begin with Bible classes spread across different ages and groups, each with 10 to 100 participants. *Id.* After classes, all congregants gather in the sanctuary for services that include baptisms, gathering closely around the altar, and laying hands upon the sick. ER 308-09. Nevertheless, Plaintiffs assert that they are willing and able to comply with distancing, cleanliness, and attire guidelines implemented by the CDC, San Diego County, and other organizations. ER 311, 505.

Plaintiffs asserted claims under the First Amendment's Free Exercise, Establishment, Free Speech, and Assembly Clauses; the Fourteenth Amendment's Due Process and Equal Protection Clauses; and the rights to liberty, freedom of speech, freedom of assembly, and free exercise of religion enumerated in Article 1, sections 1 through 4, of the California Constitution. ER 515-530.

B. The District Court's Denial of Plaintiffs' Application for Temporary Restraining Order

After their initial application for a TRO was rejected for non-compliance with local meet-and-confer rules, ER 610, Plaintiffs filed an amended TRO application on May 11. ER 268. Plaintiffs based the application on their claims under the Free Exercise, Due Process, and Equal Protection Clauses and the free religious

exercise provision of the California Constitution. *See* ER 272. As Plaintiffs sought relief by the next Sunday, Defendants filed an opposition three days later. ER 63, 129.

On May 15, after a one-hour hearing, the district court denied the TRO application. ER 1, 27-32. Applying the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the court ruled that, given the serious public health crisis, the State imposed permissible, reasonable restrictions on the rights of individuals to freely exercise their religion, and, therefore, Plaintiffs were unlikely to succeed on their claims. ER 27; *see also* ER 32 ("The only way currently known to curb the disease is to limit personal exposure.").

Addressing the Free Exercise Clause directly, the court ruled the State's then-controlling directives constitutional because "any burden placed by classifying church services as Stage 3 are not because of a religious motivation," but rather because such gatherings "pose a greater risk of exposure to the virus." ER 28. The court further found that many other comparable activities "that involve people sitting together in a closed environment for long periods of time" are prohibited. ER 28-29; *see also* ER 31 ("Religious services are treated similar to other activities where large groups come together for a period of time, like movies, concerts, theater, or dance performances."). In that regard, the court found that the categorization of activities in each stage of the Resilience Roadmap reopening plan

was based on the "risk of contracting the virus while participating in that activity." ER 30-31. The court concluded that the restrictions imposed were rationally based on "protecting safety and stopping the virus spread." ER 28-29.

Although the district court held strict scrutiny inapplicable, it also found in the alternative that the directives would satisfy such scrutiny because they were narrowly tailored to furthering the State's compelling interest in safety and health, ER 29-30, and congregants were permitted to gather over the phone, via video conference, in person with household members, and at drive-in services. *Id.*

In addition, the district court found that Plaintiffs failed to show a likelihood of success on their equal protection claim because they presented "no evidence that similarly situated persons or businesses are treated differently." ER 30-31. In that regard, the court found, the distinctions among business and activities were based on the risk factors of contracting COVID-19, and therefore, "the government is not treating differently businesses that are alike." *Id.* The district court also found that Plaintiffs' substantive due process claim is unlikely to succeed because the State's directives did not "shock[] the conscience." ER 31-32.

Finally, noting that "[t]he only way currently known to curb the disease is to limit personal exposure," the court held neither the public interest nor the balance of equities supported issuance of a TRO. ER 32 ("[I]t is in the public interest to continue to protect the population as a whole."). In so doing, the court observed

that State officials still need to continue to monitor how each stage of reopening affects infection rates and public health, and adapt accordingly. *Id.*

C. This Court's Denial of Plaintiffs' Motion for Injunction Pending Appeal

A few hours after the hearing, Plaintiffs noticed an appeal, ER 43, and filed a *pro forma* application for injunction pending appeal, ER 34, which the district court denied, 2020 WL 2529620.

The next day, Saturday, May 16, at around 6:30 p.m., Plaintiffs filed with this Court an emergency motion for injunction pending appeal seeking relief the following day. Dkt. No. 2. This Court denied that motion on May 22 ruling that Plaintiffs "have not demonstrated a sufficient likelihood of success on appeal." Dkt. No. 29, at 3 (*S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) (*South Bay II*)).[5] The Court explained,

> We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a "[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

South Bay II, 959 F.3d at 939 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)). The Court also found that the remaining

[5] For ease of reference, this brief will cite to the published version of this Court's opinion denying Plaintiffs' emergency motion for injunction pending appeal, 959 F.3d 938 (*South Bay II*).

injunction factors "do not counsel in favor of injunctive relief." *Id.* at 940. Judge Collins dissented. *Id.*

IV. THE MAY 25, 2020 GUIDELINES REOPENING IN-PERSON RELIGIOUS WORSHIP SERVICES

On May 25, 2020, in light of the State's success in slowing the spread of COVID-19 and marshaling public health resources, California issued guidelines for places of worship and providers of religious services. State Defs.' Mot. for Judicial Notice ("State Defs.' MJN") Ex. 2. Much like the guidance developed in parallel by the CDC,[6] California's guidelines contain instructions and recommendations for physical distancing during worship services as well as cleaning and disinfection protocols, training for employees and volunteers, and individual screening and monitoring. In keeping with the CDC's recognition and recommendation that the size of worship services may be limited in "accordance with guidance from state and local authorities,"[7] the May 25 guidelines also limited in-person worship services to 100 attendees or 25% of building capacity, whichever is less. State Defs.' MJN Ex. 2.[8] In light of these guidelines, there is no

[6] *Interim Guidance for Communities of Faith*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/php/faith-based.html (last accessed June 24, 2020).

[7] *Id.*

[8] Similar numerical limits were placed on protests, but no other mass gatherings were permitted. *See* Stay home Q&A, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed June 23, 2020).

longer any statewide prohibition against in-person religious services in California, and such services may resume if permitted by the relevant county.

V. THE SUPREME COURT'S DENIAL OF PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

On May 23, the day after this Court denied a motion for injunction pending appeal, Plaintiffs filed with the Supreme Court an emergency application for writ of injunction which they later amended to seek an injunction pending appeal against the May 25 guidelines as well as the Resilience Roadmap.[9]

On May 29, the Supreme Court denied that application, in a 5-4 decision. Dkt. No. 31 (*S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020) (*South Bay III*)).[10] Chief Justice Roberts filed a concurring opinion concluding that the California restrictions are consistent with the Free Exercise Clause:

> Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people

[9] Emergency App. for Writ of Inj., https://www.supremecourt.gov/DocketPDF/19/19A1044/144133/20200523140701636_Emergency%20Application%20for%20Writ%20of%20Injunction.pdf; Supplemental Br. in Supp. of Emergency App. for Writ of Inj., https://www.supremecourt.gov/DocketPDF/19/19A1044/144227/20200526154016842_Supplemental%20Brief%20iso%20Emergency%20Application.pdf.

[10] For ease of reference, this brief will cite to the published version of the Supreme Court's opinion denying Plaintiffs' application for writ of injunction, 140 S. Ct. 1613 (*South Bay III*).

> neither congregate in large groups nor remain in close proximity for extended periods.

140 S. Ct. at 1613; *see also id.* at 1614 ("The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable.").

Chief Justice Roberts further explained that the "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials in the States 'to guard and protect,'" *id.* at 1613 (quoting *Jacobson*, 197 U.S. at 38), and that the latitude of those officials "'must be especially broad'" and "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.* at 1613-14 (quoting *Marshall v. United States*, 414 U. S. 417, 427 (1974); *Garcia v. San Antonio Met. Transit Auth.*, 469 U. S. 528, 545 (1985)).

Justice Kavanaugh filed a dissenting opinion in which he compared religious services to "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries," which are not subject to the same capacity caps as are in-person, indoor religious services. *Id.* at 1614. He did not explain why these activities—all of which involve transitory interactions where people neither congregate in large groups nor remain in close proximity for extended periods—are analogous to in-person worship services. *Id.*

VI. THE JUNE 12, 2020 AMENDMENT TO THE GUIDELINES FOR IN-PERSON WORSHIP SERVICES

On June 12, the State amended the in-person worship guidelines to remove any attendance limit on outdoor services. State Defs.' MJN Ex. 1, at 3. Still, the new guidelines recommend that "outdoor attendance should be limited naturally through implementation of strict physical distancing measures" and other protocols. *Id.* The June 12 guidelines keep in place the 100-person or 25% capacity cap for indoor worship services. *Id.*

To date, Plaintiffs have not sought to amend their complaint to include any allegations about the State's operative guidelines on worship services, nor have they moved the district court for a TRO or preliminary injunction against these guidelines.

SUMMARY OF ARGUMENT

1. This Court should dismiss the appeal because it is moot. In their TRO application, Plaintiffs sought to enjoin the prohibition on in-person worship services in the State's initial Stay-at-Home Order and the Resilience Roadmap, both of which have been superseded by the specific guidelines for worship services allowing Plaintiffs to congregate in person for worship services, albeit subject to attendance limits indoors. In addition, Plaintiffs have not sought to amend their operative complaint to include allegations of harm related to the new guidelines, moved the district court to enjoin them in the first instance, or presented evidence

of any harm under the new guidelines. Thus, no actual live controversy concerning the order on appeal remains.

2. Even if the appeal is not moot, this Court should affirm the district court's order because Plaintiffs have failed to demonstrate any of the elements required for preliminary injunctive relief.

a. Plaintiffs have not demonstrated that they will suffer irreparable harm absent injunctive relief. Because the new guidelines permit in-person worship services, and Plaintiffs have not presented evidence of any injury from the attendance limits in the guidelines, Plaintiffs have shown no irreparable injury.

b. Plaintiffs also have not shown a likelihood success on the merits.

Plaintiffs' claims are contrary to the vast weight of precedent. Every request so far to enjoin California's temporary restrictions on religious worship has failed, including Plaintiffs' own motions for an injunction pending appeal in this Court and the Supreme Court. In addition, more than twenty similar challenges have been rejected by trial and appellate courts across the country.

Plaintiffs' Free Exercise Clause Claims fails because, as Chief Justice Roberts recognized, far from discriminating against religious conduct, California imposes similar or more severe restrictions on all comparably risky secular gatherings such as plays, concerts, and sporting events in which groups of people gather together in the same place at the same time for extended periods in a shared, communal

experience. In addition, the limited restrictions imposed on worship services are constitutional exercises under *Jacobson*, 197 U.S. 11, which numerous courts as well as Chief Justice Roberts have recognized applies here, because these restrictions further the State's interest in combatting the COVID-19 virus and do not constitute a plain, palpable constitutional violation. Plaintiffs' new claim of selective enforcement is not properly before this Court and, in any event, is baseless. And, in light of the well-documented threat to public health posed by in-person worship services and the deference owed to the expert medical judgments that public health officials must make in the face of the epidemic to save lives, the restrictions in question survive even strict scrutiny.

Plaintiffs' claims under the Due Process and Equal Protection Clauses are unlikely to succeed for similar reasons, and the Eleventh Amendment bars their claim under state law.

c. The balance of equities weighs sharply and heavily against issuance of an injunction. As they may now congregate for in-person worship, if Plaintiffs are threatened by any irreparable injury, it is limited. In stark contrast, enjoining any and all limits on worship could severely endanger public health and safety and the State's efforts to protect Californians against a virulent and frequently deadly disease, especially given how often in-person worship services have acted as "super-spreader" events and caused far-reaching outbreaks of the disease.

STANDARD OF REVIEW

This Court reviews an appeal from the denial of preliminary injunctive relief for abuse of discretion. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Such review is "limited and deferential," *id.* (internal quotation marks omitted), and the denial of Plaintiffs' TRO should be reversed only if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact," *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016) (internal quotation marks omitted).

Like a preliminary injunction, a temporary restraining order is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 22 (2008). In particular, parties seeking such extraordinary relief bear the heavy burden to demonstrate (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *Id.* at 20. Alternatively, injunctive relief "is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," but even under this test, plaintiffs must still make a showing of each of the four *Winter* factors: irreparable harm, likelihood of success on the merits, balance of hardships favoring

the plaintiffs, and the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132-35 (9th Cir. 2011).

Finally, because they seek a mandatory injunction to disrupt the already-implemented COVID-19-related directives regarding religious services, Plaintiffs must meet the "doubly demanding" burden of "establish[ing] that the law and facts *clearly favor* [their] position." *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE GUIDANCE ISSUED SINCE THE ORDER ON APPEAL PERMITS IN-PERSON WORSHIP.

A. Plaintiffs Have Already Received Their Requested Relief.

Because this Court's jurisdiction is limited to live cases or controversies, U.S. Const. art. III, § 2, it must dismiss an appeal when the issues presented are no longer live. *Lewis*, 494 U.S. at 477-78; *see also Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). A change in the applicable law or regulatory framework "is usually enough to render a case moot, even if the [government] possesses the power to reenact the [law] after the lawsuit is dismissed." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (internal quotation marks omitted); *see also United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (finding no live dispute remained because the statute

at issue had been amended); *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (same).

Where "the mootness is attributable to a change in the legal framework governing the case," the appropriate action is for this Court to "remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." *Lewis*, 494 U.S. at 482-83; *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (*per curiam*); *Vegas Diamond Props. v. F.D.I.C.*, 669 F.3d 933, 937 (9th Cir. 2012); 28 U.S.C. § 2106.

Here, the relevant legal framework has changed. In their operative complaint and in the TRO application underlying this appeal, Plaintiffs sought relief only from the Resilience Roadmap (and continued application of the Stay-at-Home Order) so they could hold in-person worship services. But as a result of the May 25 guidelines issued after this appeal was noticed, the reopening plan no longer prevents them from holding in-person worship services, and they may hold services outdoors without any attendance limit and indoors with a limit of 100 persons or 25% building capacity (whichever is less). Because Plaintiffs no longer need any relief from the order on appeal, the appeal is now moot. *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 (finding appeal moot where state law changed while the case was pending); *cf. Elim Romanian Church v. Pritzker*, __ S. Ct. __,

No. 19A1046, 2020 WL 2781671, at *1 (May 29, 2020) (*Elim Romanian III*) (denying injunctive relief due to issuance of new guidance).

Although the new guidelines impose some restrictions on in-person services, Plaintiffs have not asserted, much less demonstrated, that they are harmed by those limits. The guidelines limit the number of individuals who may attend an indoor service at one time, but nothing prevents Plaintiffs from holding multiple indoor services (or larger services outside) to accommodate all interested congregants; indeed, the guidelines encourage them to "offer[] additional meeting times." State Defs.' MJN Ex. 1, at 9. Notably, Plaintiffs do not assert that they are unable to hold a sufficient number of services to accommodate all those interested. In fact, Plaintiffs indicated to the district court that fewer congregants will attend services during the current public health crisis because some congregants may "feel uncomfortable gathering during the pandemic;" and they pledged to "encourage" such uncomfortable congregants "to stay at home" and also to "require" anyone who is sick to also "stay at home." ER 505. Plaintiffs also affirm that they are willing and able to comply with guidelines concerning distancing, cleanliness, and attire, including those promulgated by the CDC, to which California's new guidelines refer. ER 311-12, 505-06; State Defs.' MJN Ex. 1, at 6-11.

While Plaintiffs possibly "'may have some residual claim under the new [legal] framework,'" the Court should nevertheless dismiss this appeal and remand

to the district court to permit Plaintiffs to amend their complaint to include allegations about the new guidelines so that the record may be developed more fully.[11] *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 (quoting *Lewis*, 494 U.S. at 482).

Indeed, the Court lacks authority to enjoin the new guidelines because such relief is greatly attenuated from the allegations, claims, and relief requested in the operative complaint and TRO application. *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (courts only have authority to grant injunctive relief where the relationship between the requested injunctive relief and the underlying complaint is "sufficiently strong" such that it is "'of the same character as that which may be granted finally'") (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)); *see also Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994). Plaintiffs have not sought to amend the operative complaint to allege harm from the new guidelines, much less moved the district court for relief from the new rules. These failures have left Defendants and the

[11] Even if not moot strictly "in the Article III sense," the Court may still find Plaintiffs' request no longer live because it is "so attenuated" from the present reality on the ground "that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980); *see also S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997).

district court—which is best suited to make such determinations in the first instance—without evidence or even allegations explaining why Plaintiffs' constitutional rights are injured by the new guidelines. As a consequence, enjoining the new directives would be far from the "same character" of relief Plaintiffs sought in the Complaint, and thus inappropriate. *Pac. Radiation*, 810 F.3d at 636.

B. Exceptions to Mootness Do Not Apply.

Neither the "voluntary cessation" nor the "capable of repetition, yet evading review" exceptions to mootness apply. As noted, a change in the governing law or regulatory framework is enough to render a case moot "even if the [government] possesses the power to reenact the [law] after the lawsuit is dismissed." *Rosebrock*, 745 F.3d at 971. Indeed, a change in the law "should not be treated the same as voluntary cessation of challenged acts by a private party" and creates a presumption of mootness that can only be overcome with "evidence in the record" showing that the prior law or policy is likely to be reimposed. *Glazing Health*, 941 F.3d at 1198-99 (describing the decisions from "nearly all [other] circuits" that support this rule); *Am. Cargo Transp. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (citing cases).

Plaintiffs have not pointed to any evidence in the record demonstrating that the State's initial prohibition on in-person worship services is likely to be

reimposed on them. Since the initial Stay-at-Home Order in March, the restrictions on public gatherings including those for religious worship have been loosening, not tightening, and far from offering any reason to believe that this trend will be reversed in San Diego, Plaintiffs point to evidence that San Diego has sought to ease further the restrictions on in-person worship services. *See* Pls.' Opening Br. ("OB") 58 & n.34. An opinion rendered under such circumstances would be merely advisory and, as such, improper. *See Spell v. Edwards*, __ F.3d __, No. 20-30358, 2020 WL 3287239, at *3 (5th Cir. June 18, 2020) ("[I]t is speculative, at best, that the Governor might reimpose the ten-person restriction or a similar one."); *Glazing Health*, 941 F.3d at 1199 (requiring the expectation be demonstrated by evidence in the record, "rather than on speculation alone").[12]

[12] Although the Seventh Circuit recently found no mootness under the voluntary cessation exception in a similar case, it incorrectly applied a standard requiring *non-government* defendants to show that it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Elim Romanian Pentecostal Church v. Pritzker*, __ F.3d __, No. 20-1811, 2020 WL 3249062, at *3 (7th Cir. June 16, 2020) (*Elim Romanian IV*) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000)). As explained above, in cases against the government, this Court's precedent makes clear that changes in governing law "should not be treated the same as voluntary cessation of challenged acts by a private party." *Glazing Health*, 941 F.3d at 1199; *see also Am. Cargo Transp., Inc.*, 625 F.3d at 1180 ("[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.") (internal quotation marks omitted); *cf. also N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 (declining to apply the "absolutely clear" standard of *Friends of the Earth*); *Microsoft Corp.*, 138 S. Ct. 1186 (same).

Even if those exceptions to mootness were to apply, the remedy would not be to disregard the well-established limits on injunctive relief and issue an injunction anyway; it would be to provide declaratory relief. *Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538 n.7 (1978); 13C Wright, Miller, et al., Fed. Prac. & Proc. Juris. § 3533.7 (3d ed.). But this Court should not provide declaratory relief at this stage because the district court is better positioned to address the request for declaratory relief in the first instance. *See Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc).

C. Vacatur of the District Court's Order Is Not Appropriate.

Upon dismissing this appeal as moot, the Court should not vacate the district court's order denying the TRO Plaintiffs requested. Although appellate courts generally vacate decisions on issues that have become moot during the pendency of an appeal, *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), vacatur is only appropriate to "'prevent an unreviewable decision from spawning any legal consequences, so that no party is harmed by . . . a "preliminary" adjudication.'" *United States v. Arpaio,* 951 F.3d 1001, 1005-06 (9th Cir. 2020) (quoting *Camreta v. Greene*, 563 U.S. 692, 713 (2011)). Thus, vacatur applies where the underlying decision has a preclusive effect, such as where a final judgment has been entered. *Id.*

The district court's order on Plaintiffs' request for preliminary injunctive relief, however, has no preclusive effect on the district court's deciding whether to issue a *permanent* injunction. *Mitchell v. Wall*, 808 F.3d 1174, 1176 (7th Cir. 2015); *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020); *Orion Sales, Inc. v. Emerson Radio Corp.*, 148 F.3d 840, 843 (7th Cir. 1998). To underscore that point, all of Plaintiffs' claims will proceed before the district court regardless as to what happens with the TRO order, whether it is affirmed, reversed, or vacated by this Court. *W. Ill. Serv. Coordination v. Ill. Dep't of Human Servs.*, 941 F.3d 299, 302 (7th Cir. 2019). In that regard, the district court's TRO denial has no binding or preclusive effect on the remainder of the litigation, and, accordingly, it should not be vacated.

II. IN THE ALTERNATIVE, IF THE MERITS OF THIS APPEAL ARE REACHED, THE ORDER ON APPEAL SHOULD BE AFFIRMED.

A. Plaintiffs Have Not Shown that They Will Suffer Irreparable Harm Absent Injunctive Relief.

"[T]he basic requisite[] of the issuance of equitable relief" is a showing of "substantial and immediate irreparable injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 104, 111 (1983) (internal quotation marks omitted); *see also Winter*, 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish that he is . . . likely to suffer irreparable harm in the absence of preliminary relief."). At the time that the order under review was issued, Plaintiffs contended that they were

suffering irreparable injury because they could not hold or attend in-person worship services. ER 279-80. But that injury no longer exists: as explained in Section I, *supra*, under California's May 25 guidelines, Plaintiffs may now resume in-person services.

Nor have Plaintiffs shown that application of the May 25 guidelines threatens them with irreparable injury. Plaintiffs devote only two sentences to the irreparable harm question, asserting in conclusory fashion that their "fundamental constitutional rights" have been violated. OB 64-65. But, as shown above, there is no evidence or formal allegation that the attendance limits on indoor worship in those guidelines have prevented any congregants from attending worship services. Although Plaintiffs include a cursory assertion that they "had to turn away congregants who wished to attend after [the 100-person] cap was reached," OB 29, they do not allege that they could not have accommodated those additional congregants by holding additional services or conducting services outdoors. Nor is there any suggestion of injury from other aspects of the guidelines. Given Plaintiffs' extensive use of evidence outside the record, *see, e.g.*, OB 25-26, 29-30, 37-39, 50-52, 55, these omissions are noteworthy.[13]

[13] *See also* Section II(B)(2)(c) (explaining why the Court should reject Plaintiffs' improper attempt to supplement the record).

Thus, Plaintiffs have failed to satisfy their burden of proving an irreparable injury absent injunctive relief, and for that reason alone, their appeal from the district court's refusal to grant them such relief fails. *See Winter*, 555 U.S. at 20; *Lyons*, 461 U.S. at 101, 111-12.

B. The District Court Correctly Held that Plaintiffs Are Not Likely to Succeed on the Merits of their Claims.

1. Plaintiffs' Claims Contradict Rulings of this Court, the Supreme Court, and the Vast Majority of Decisions on this Issue Across the Country.

Plaintiffs assert that, as soon as governors began issuing executive orders seeking to curb the COVID-19 pandemic, groups "began successfully seeking emergency injunctive relief" against them. OB 18. In fact, in the overwhelming majority of cases considering restrictions on in-person worship services, injunctive relief has been denied.

Including this case, plaintiffs in four lawsuits have moved for preliminary injunctive relief against the temporary restrictions California has imposed on worship services; each has failed. ER 1 (TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-00683-BAS-AHG (S.D. Cal. Apr. 10, 2020) (TRO) (State Defs.' MJN Ex. 3); *id.*, 2020 WL 2991467 (June 4, 2020) (preliminary injunction); *Gish v. Newsom*, No. EDCV-20-755-JGB (KKx), 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (TRO); *id.* No. 20-55445 (9th Cir. May 7, 2020) (injunction pending appeal); *Cross Culture*, 2020 WL 2121111 (TRO). Additionally, in this

case, this Court has already denied Plaintiffs' motion for injunction pending appeal, *South Bay II*, 959 F.3d 938, and the Supreme Court denied Plaintiffs' request to enjoin the May 25 guidelines, *South Bay III*, 140 S. Ct. 1613.

Other courts have done the same. State and federal district courts have denied temporary restraining orders or preliminary injunctions against restrictions on in-person worship services in at least eighteen cases.[14] In addition, five circuits in addition to this one have denied motions for injunctions pending appeal against such restrictions. *Elim Romanian IV*, 2020 WL 3249062 (affirming denial of

[14] *Harborview Fellowship v. Inslee*, No. 3:20-cv-05518-BHS (Docket Entry 42) (W.D. Wash. June 18, 2020); *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 3263902 (D. Colo. June 16, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, No. 2:20-cv-00907-RFB-VCF, 2020 WL 3108716 (D. Nev. June 11, 2020), *appeal docketed*, No. 20-16169 (9th Cir.); *Bullock v. Carney*, No. 1-20-cv-674, 2020 WL 2813316 (D. Del. May 29, 2020); *Antietam Battlefield KOA v. Hogan*, No. 1:20-cv-01130-CCB, 2020 WL 2556496 (D. Md. May 20, 2020); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-00674-AVC (D. Conn. May 18, 2020); *Spell v. Edwards*, No. CV-20-00282-BAJ-EWD, 2020 WL 2509078 (M.D. La. May 15, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-C-2782, 2020 WL 2468194 (N.D. Ill. May 13, 2020) (*Elim Romanian I*); *Calvary Chapel of Bangor v. Mills*, No. 1:20-CV-00156-NT, 2020 WL 2310913 (D. Me. May 9, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352 (W.D. Wash. May 8, 2020); *Cassell v. Snyders*, No. 20-C-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-204, 2020 WL 2110416 (E.D. Va. May 1, 2020); *Legacy Church v. Kunkel*, No. CIV-20-0327-JB\SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020); *Davis v. Berke*, No. 1:20-CV-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020); *Tolle v. Northam*, No. 1:20-cv-00363-LMB-MSN, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020), *motion for injunction pending appeal denied*, No. 20-1419 (4th Cir. Apr. 28, 2020); *Nigen v. New York*, No. 1:20-cv-01576-EK-PK, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020); *Elkhorn Baptist Church v. Brown*, 366 Or. 506 (2020); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Superior Ct. March 25, 2020).

motion for preliminary injunction of ten-person limit); *id.*, 2020 WL 2517093, at *1 (May 16, 2020) (*Elim Romanian II*) (denying motion for injunction pending appeal); *Calvary Chapel of Bangor v. Mills*, No. 20-1507 (1st Cir. June 2, 2020) (Doc. No. 117596871) (ten-person limit); *Bullock v. Carney*, __ F.3d __, No. 20-2096, 2020 WL 2819228 (3d Cir. May 30, 2020) (30% capacity limit); *Hawse v. Page*, No. 20-1960 (8th Cir. May 19, 2020) (ten-person limit); *Tolle v. Northam*, No. 20-1419 (4th Cir. Apr. 28, 2020) (ten-person limit).

Glossing over the decisions from the Fourth and Seventh Circuits, OB 22, 24, and ignoring entirely the First, Third, and Eighth Circuits' rulings issued prior to their Opening Brief, Plaintiffs focus on the Sixth Circuit's opinion in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (*per curiam*), which imposed an injunction pending appeal on a Kentucky restriction on in-person worship services. But that restriction, which even Kentucky's attorney general believed unconstitutional, *id*. at 411, was part of an order that, in sharp contrast to California's directives, prohibited all worship services, even drive-in services, *id*. at 411-12. In addition, Kentucky's governor failed to explain the distinctions drawn between worship services and permitted secular activities, *id*. at 414, even though the Sixth Circuit had partially enjoined the order a week earlier due to the absence of an explanation, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615-16 (6th Cir. 2020).

Plaintiffs also incorrectly state that the Fifth Circuit enjoined a "similar governor's executive order." OB 24 (discussing *First Pentecostal Church of Holly Springs v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020) (*per curiam*)). In fact, the Fifth Circuit enjoined a municipal order, which, in sharp contrast to California's guidelines, prohibited all in-person services. 959 F.3d at 669-70. In addition, far from challenging the guidelines issued by the governor in that state, the Fifth Circuit "refer[red] the Church [plaintiff] to the Governor's new 'Safe Worship Guidelines for In-Person Worship Services." *Id.*

Plaintiffs similarly fail to mention the district court cases listed above refusing to enjoin restrictions on worship services, including those in California. While Plaintiffs point to five other district court decisions, OB 41, two of those concerned the anomalous Kentucky order discussed above. *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020); *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, 2020 WL 2393359 (W.D. Ky. May 8, 2020). Another enjoined a municipal prohibition against drive-in services, *On Fire Christian Center v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020), something California has never prohibited. And the remaining two enjoined bans against all in-person religious services, *see First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *6 (D. Kan. Apr. 18, 2020); *Berean Baptist*

Church v. Cooper, No. 4:20-CV-81-D, 2020 WL 2514313, at *7 (E.D.N.C. May 16, 2020), which California's guidelines have dropped. And far from suggesting that attendance limits are unconstitutional, the Sixth Circuit decision on which Plaintiffs rely faulted Kentucky's governor for not considering "a limit [on] the number of people who can attend a service at one time." *Roberts*, 958 F.3d at 416.[15]

Plaintiffs also point to the dissent from this Court's denial of Plaintiffs' request for an injunction pending appeal, OB 25, and the dissenting opinion from the Supreme Court's denial, OB 28-29. However, they fail to explain why opinions that failed to garner a majority in either this Court or the Supreme Court suggest a likelihood of success. Nor, for that matter, do Plaintiffs recognize that the dissent in this Court faulted the State's reopening plan for not imposing restrictions on "the number of attendees, the size of the space, or the safety protocols followed in such services," *South Bay II*, 959 F.3d at 946 (Collins, J., dissenting), which California has now done because it is now permitted by public health conditions.

In short, precedent suggests little likelihood of success.

[15] Plaintiffs' citation to the decision in *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497 (2020), OB 58 n.35, is also misplaced because that case did not concern the emergency powers of the state or individual constitutional rights.

2. The State's Directives Do Not Violate the Free Exercise Clause.

Plaintiffs' discussion of their Free Exercise claim fares no better.

a. The State's Restrictions on Indoor, In-Person Worship Services Do Not Discriminate Against Religion.

As Plaintiffs recognize, the Free Exercise Clause's protections apply "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 533, 543 (1993). The Clause is not violated, however, by state action that does not "'infringe upon or restrict practices because of their religious motivation,'" and does not "in a selective manner[,] impose[] burdens only on conduct motivated by religious belief.'" *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076, 1079 (9th Cir. 2015) (quoting *Lukumi,* 508 U.S. at 533, 543). There is no discrimination here—and the case therefore falls into the latter category—because under the State's directives "[s]imilar or more severe restrictions apply to comparable secular settings." *South Bay III*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

In applying the Free Exercise Clause, courts compare the treatment of religious activity to that of "*analogous* non-religious conduct." *Lukumi*, 508 U.S. at 546 (emphasis added); *see also Stormans*, 794 F.3d at 1079 (examining "*comparable* secular conduct") (emphasis added). As the Seventh Circuit has

explained, in terms of risk of spreading COVID-19, in-person worship services are comparable to other "congregate functions" that occur in a single place for an extended period of time:

> [Worship services] seem most like other congregate functions that occur in auditoriums, such as concerts and movies. Any of these indoor activities puts members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air. Functions that include speaking and singing by the audience increase the chance that persons with COVID-19 may transmit the virus through the droplets that speech or song inevitably produce.

Elim Romanian IV, 2020 WL 3249062, at *5. Thus, religious services are analogous to "concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods," but not to activities such as "shopping, in which people do not congregate or remain for extended periods." *Elim Romanian II*, 2020 WL 2517093, at *1.

Plaintiffs are unlikely to show any discrimination against religious beliefs in California's restrictions on in-person worship services because, as Chief Justice Roberts found, California imposes similar or more severe restrictions on comparable secular gatherings:

> Similar or more severe restrictions apply to *comparable* secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only *dissimilar* activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for

extended periods.

South Bay III, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (emphasis added). Indeed, while California now permits in-person religious services with attendance limits for indoor services (but not for outdoor services), many other activities that are comparable in terms of COVID-transmission risk—concerts, lectures, theatrical performances, movie theaters, in which groups of people gather together for extended periods in a shared, communal experience—are either barred or subject to similar limits.

As Dr. James Watt, the Acting Deputy Director of the Center for Infectious Diseases and Interim State Epidemiologist at the California Department of Public Health, explained, the limits on indoor religious services and similar communal gatherings are based on the risk of transmission those gatherings pose:

> Whenever a large group of people interact, there is an increased risk that COVID-19 may be transmitted. There have been multiple reports of sizable to large gatherings such as religious services, choir practices, funerals, and parties resulting in significant spread of COVID-19.
> . . .
> [T]he virus can be spread by people who are not showing symptoms. Thus, people who gather in groups or near others (other than those with whom they live) will not be able to know whether other individuals who are in close proximity are carrying the virus. By gathering in large groups, and in close proximity to others, individuals put themselves and others at risk. The risk appears to be increased where groups of individuals are in close proximity for extended periods.

ER 125; *see also* ER 127 ("Individuals attending large gatherings . . . would be at increased risk of disease and could be expected to increase the spread of COVID-

19 in their communities and any other communities they visit."). This is especially true for gatherings that include singing, chanting, or group recitation because the novel coronavirus that causes COVID-19 spreads "mainly through respiratory droplets" which can "land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs." ER 125. The numerous reports of worship services becoming "super-spreader" events resulting in dozens, hundreds and even thousands of new infections, unfortunately, confirm the conclusion that large gatherings, including religious services, create a high risk of transmission. *See* Section II(B)(2)(d), *infra*.

Plaintiffs assert that the comparisons drawn by Dr. Watt and adopted by Chief Justice Roberts are "factually false." OB 49. In support of this bold assertion, they point to the comparison drawn by Justice Kavanaugh and the Sixth Circuit between in-person worship services and shopping. OB 50. As noted above, however, the Sixth Circuit had no evidence or explanation before it to support a different comparison, and Plaintiffs do not explain how a comparison drawn by a dissenting Supreme Court justice is reason to discount the comparison drawn by the Chief Justice who cast the deciding vote against their motion, especially when other judges have drawn the same comparison as the Chief Justice. *See, e.g.*, *Elim Romanian IV*, 2020 WL 3249062, at *5; *Elim Romanian II*, 2020 WL 2517093, at *1. Even more importantly, while Plaintiffs assemble statistics and present

screenshots from videos, they do not even attempt to explain how an appellate court may reject the opinion of a public health expert such as Dr. Watt based on such scant evidence.[16]

Plaintiffs point to a declaration from a family practice doctor, George Delgado, submitted in the trial court. OB 53; ER 317-18. Dr. Delgado, however, does not claim to have any training in epidemiology or public health beyond treating people with "viral illnesses such as influenza, which tend to occur in epidemics." ER 315. Thus, his expertise pales in comparison to that of Dr. Watt, who has worked as an epidemiologist at the CDC; taught at Johns Hopkins and UCSF; served on advisory panels at the World Health Organization and the CDC; and acted as California's Deputy State Epidemiologist for seven years. ER 124-25. Moreover, far from offering any persuasive explanation for the conclusion that grocery stores pose a higher risk than worship services, Dr. Delgado calculated the risk using relative risks he asserted, without data or explanation. Such unexplained opinions have no probative value. *See Huey v. United Parcel Serv., Inc*., 165 F.3d 1084, 1087 (7th Cir. 1999) ("An expert who supplies nothing but a bottom line

[16] Plaintiffs also fail to explain how this evidence, which was not presented to the district court, may be considered by this Court in the first instance. As this Court has observed, it is a "basic tenet of appellate jurisprudence" that "parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below." *Lowry v. Barnhart*, 329 F.3d 1019, 1024–25 (9th Cir. 2003) (internal quotation marks omitted).

supplies nothing of value to the judicial process."). Moreover, Dr. Delgado's tragically incorrect prediction of the deaths in Los Angeles County[17] removes any credibility from his opinions regarding epidemiology.

Plaintiffs provide their own ruminations concerning the relative risks of shopping. OB 50-51. As they acknowledge, however, when shopping people "do not spend a significant amount of time next to a single person," OB 52, nor do they engage in the sort of group singing, chanting, and recitation that is typical of activities like worship services, sporting events, and concerts. *See Elim Romanian IV*, 2020 WL 3249062, at *5. Plaintiffs try to downplay these factors by asserting that "what matters is that someone coughs or speaks next to someone else[,] not how long they spend together." OB 52. But, as Dr. Watt showed, those factors matter as well, ER 125-27, and Plaintiffs do not even begin to explain how their observations provide a basis for second guessing the State's expert judgment on this issue.

Plaintiffs also equate worship services with factories. OB 54-55. They do so based solely on a photograph, which is not in the record and which they

[17] Dr. Delgado predicted that "total deaths in Los Angeles County will be approximately 1,900 for this year," ER 317, but, to date, more than 3,200 people have *already* died there, *see* http://publichealth.lacounty.gov/media/coronavirus/ (last accessed June 26, 2020). Plaintiffs' suggestion that the COVID-19 pandemic has reached "Stabilization" (OB 4) likewise has turned out to be demonstrably wrong. *See id*.

acknowledge was taken before the pandemic, OB 55 n. 29, and, indeed, is from an American Apparel factory that has not operated in the United States since 2017.[18] Plaintiffs offer no evidence that any factories currently operate under the conditions depicted; indeed, current manufacturing guidelines require physical distancing of at least six feet between each worker, as well as worksite specific COVID-19 prevention plans, employee training, and daily screening.[19] In addition, manufacturing facilities are subject to regulations and inspections that provide workers with protections not enjoyed by religious congregants. For example, employers must immediately notify authorities when on-site COVID-19 contraction is suspected, *see* Cal. Labor Code § 6409.1(b), and they are required to maintain records of the employees present, *see* Cal. Labor Code § 226(a), which permits easy contact tracing. There are no parallel requirements for religious services, for good reason. *Cf. Larson v. Valente*, 456 U.S. 228, 255 (1982). Thus, there is no reason to equate factories with worship services. *See Elim Romanian IV*, 2020 WL 3249062, at *5 ("It is not clear to us that warehouse workers engage

[18] *See* https://www.latimes.com/business/la-fi-american-apparel-made-in-usa-20140810-story.html; https://www.latimes.com/business/la-fi-american-apparel-layoffs-20170116-story.html.

[19] *COVID-19 Industry Guidance: Manufacturing* (May 12, 2020), https://files.covid19.ca.gov/pdf/guidance-manufacturing.pdf (last accessed June 26, 2020).

in the sort of speech or singing that elevates the risk of transmitting the virus, or that they remain close to one another for extended periods[.]").

Plaintiffs' cursory assertions about restaurants and schools are equally unpersuasive. See OB 55. Although Plaintiffs quote statistics—again, outside the record—about the average time spent dining from nearly two decades ago, they offer no evidence concerning the comparative risks posed by restaurants or schools. Diners, however, usually do not go to restaurants to engage in a shared communal experience with others not at their tables, and they typically arrive for their meals and leave at time of their own choosing. In addition, in asserting that some restaurants can seat 100 guests or more, Plaintiffs ignore the current guidelines for restaurants, which limit current capacity by, among other things, requiring that tables be spaced six feet apart as well as physical distancing in kitchens and other high-traffic employee areas.[20]

Even if Plaintiffs had submitted their newly presented evidence to the district court and subjected it to adversarial testing, it would provide no ground on which to question the assessment of comparative risk made by State public health officials, much less deem that assessment "factually false," as Plaintiffs so contend, OB 49. As Chief Justice Roberts observed in rejecting such arguments,

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[20] *See COVID-19 Industry Guidance: Dine-In Restaurants* (May 12, 2020), https://files.covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf (last accessed June 26, 2020).

"[o]ur Constitution principally entrusts '[t]he safety and health of the public' to the politically accountable officials of the State 'to guard and protect.'" *South Bay III*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38). Consequently, when an emergency requires public health officials to make decisions and act "in areas fraught with medical and scientific uncertainties, their latitude must be especially broad," and "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.* at 1614 (internal quotation marks omitted). Thus, even if they had been properly raised below, Plaintiffs' arguments concerning the comparative risks of shopping, manufacturing, and restaurants should be rejected.

Plaintiffs also fault the State's response to the COVID-19 pandemic because it permitted various businesses identified as "essential" to remain open. OB 40-41. It is well-settled, however, that the mere presence of some secular exemptions does not automatically mandate exemptions for any and all religious activity. *Lukumi*, 508 U.S. at 543 (requiring "*substantial*" underinclusivity for a finding of non-general applicability) (emphasis added); *Stormans*, 794 F.3d at 1079 (same); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) (recognizing that courts have "refused to interpret [*Emp't Div. v. Smith*] as standing for the proposition that a secular exemption automatically creates a claim

for a religious exemption"); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1086-87 (S.D. Cal. 2016) (collecting cases). "The government need not choose between doing nothing in the face of a pandemic and closing all of society." *Legacy Church*, 2020 WL 1905586, at *36 n.12. Exemptions raise Free Exercise Clause concerns only if they apply to secular conduct that endangers the government's interest "in a similar or greater degree" than the prohibited religious conduct. *Lukumi*, 508 U.S. at 543. As just demonstrated, Plaintiffs have not shown that to be the case here.

Finally, Plaintiffs assert that the restrictions on worship services have been motivated by animus or indifference. OB 34-35. Plaintiffs base this charge on a statement made by Governor Newsom on May 7, 2020 in which, they assert, he deemed worship a "low reward" activity." OB 35. That is inaccurate. The Governor stated that "low risk" activities were favored for opening regardless of perceived "reward." *See* Gov. Gavin Newsom, Press Conference, Tr. 50:58-51:23 (May 7, 2020) ("We're looking at the science, epidemiology looking again at frequency, duration, time and looking at low risk, high reward, low risk, low reward, looking at a series of conditions and criteria as well as best practices from other States and nations[.]").[21] Moreover, in comments that Plaintiffs ignore, the

[21] https://www.rev.com/blog/transcripts/gov-gavin-newsom-california-covid-19-briefing-transcript-may-7.

Governor stressed the risk of transmission posed by worship services: "As it relates to churches . . . [o]ur fear is simply this, congregations of people mixing from far and wide, coming together proximate in an enclosed space at large scales, is a point of obvious concern and anxiety." *Id.* at 52:22-53:25 And presaging the new guidance released on May 25, the Governor noted his sensitivity to "those that want to get back into church," and his desire to "see what we can do to accommodate that." *Id.* at 53:25-54:20. Not surprisingly, no judge at the district court, appellate, or Supreme Court level has credited Plaintiffs' assertions of animus.[22]

In sum, because the State's directives treat religious activities no worse and in some instances better than secular ones posing a comparable risk of spreading COVID-19, the restrictions imposed on indoor, in-person worship services are subject to deferential, rational basis review, *Stormans*, 794 F.3d at 1076, which they easily satisfy because the restrictions undoubtedly further the government's interest in curbing COVID-19's spread. Thus, Plaintiffs are unlikely to succeed in showing that the State's directives violate the Free Exercise Clause.

[22] Contrary to Plaintiffs' assertion, OB 35, this issue was addressed before the Supreme Court, *see* Opp'n of State Respondents, at 21 n.32, *South Bay III*, https://www.supremecourt.gov/DocketPDF/19/19A1044/144426/20200528194451283_South%20Bay%20Pentecostal%20Church%20v.%20Newsom%20-%20Opposition%20-%205.28.20%20-%20No%2019A1044.pdf.

b. The Restrictions on Indoor, In-Person Worship Services Are Also a Permissible Exercise of the State's Power to Respond to Public Health Emergencies.

Even if Plaintiffs somehow could muster the evidence to prove a violation of the Free Exercise Clause under ordinary constitutional analysis, they still would have no likelihood of success in light of the current public health emergency.

The Supreme Court has long recognized that "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease," *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), and that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," *Jacobson*, 197 U.S. at 27 (internal quotation marks omitted). Consequently, it is not a court's role "to determine which one of two modes [is] likely to be the most effective for the protection of the public against disease." *Id.* at 30. To the contrary, because States often must take swift and decisive action during a health emergency, constitutional rights may be reasonably restricted "as the safety of the general public may demand." *Jacobson*, 197 U.S. at 29. Thus, a measure taken to combat a public health emergency will be upheld against constitutional challenge unless that measure has no "real or substantial relation" to the emergency or "is, beyond all question, a plain, palpable invasion of rights" secured by the Constitution. *Id.* at 31.

The State's restrictions imposed on indoor, in-person worship services plainly have a "real [and] substantial relation" to public health and safety, namely, combatting the spread of the contagious and deadly COVID-19 virus. *Jacobson*, 197 U.S. at 31. Indeed, the virus's infectious nature and asymptomatic spread, as well as the absence of any vaccination or widely effective treatment, make restrictions on public gatherings crucial to slowing its spread. As the district court observed, "[t]he only way currently known to curb the disease is to limit personal exposure." ER 32; *see also Gish*, 2020 WL 1979970, at *4 ("[M]easures limiting physical contact between citizens . . . are widely recognized as the only way to effectively slow the spread of the virus."); *Cross Culture*, 2020 WL 2121111, at *5 (finding the initial executive order to "bear a real and substantial relation to public health").

In addition, the State's directives are not "beyond all question" a "plain, palpable" invasion of Plaintiffs' constitutional right to exercise their religion. *Jacobson*, 197 U.S. at 31. Contrary to Plaintiffs' assertion, OB 64, not even the initial Stay-at-Home Order and accompanying directives—which temporarily prohibited in-person services altogether—banned worship. To the contrary, because the directives permitted on-line and drive-in services, as well as worship at home, "a wide swath of religious expression remain[ed] untouched." *Gish*, 2020 WL 1979970, at *5; *see also Elim Romanian IV*, 2020 WL 3249062, at *5. This is

even more true with the current guidelines, which permit Plaintiffs to congregate for in-person outdoor worship services without limit and subject to attendance limits for indoor services only.

Plaintiffs assert that *Jacobson* is inapposite because it was decided before the incorporation of the First Amendment to the States, OB 61-62, but they do not explain why the Supreme Court's reasoning in *Jacobson* does not extend to the First Amendment as well as other constitutional provisions. Nor is there one, as evidenced by the plethora of cases cited above that have applied *Jacobson* to First Amendment challenges to COVID-19 emergency measures, *e.g.*, *Elim Romanian IV*, 2020 WL 3249062; *Antietam Battlefield*, 2020 WL 2556496; *Cassell*, 2020 WL 2112374; *Legacy Church*, 2020 WL 1905586, as well as recent cases concerning mandatory vaccination programs, *e.g.*, *Workman v. Mingo Cty. Bd. of Ed.*., 419 Fed. Appx. 348 (4th Cir. 2011); *Whitlow*, 203 F. Supp. 3d 1079; *see also Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015) ("[W]e agree with [*Workman*], following the reasoning of *Jacobson* and *Prince*, that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause."). While Plaintiffs point out that past cases in the Supreme Court have not applied *Jacobson* to First Amendment challenges, Chief Justice Roberts exploded that contention by applying *Jacobson* to the Free Exercise claim in this case. *South Bay III*, 140 S. Ct. at 1613-14.

The cases cited by Plaintiffs where courts, applying *Jacobson*, enjoined COVID-19-related abortion restrictions are readily distinguishable because those restrictions amounted to an outright ban on abortion for the affected women, given the time-sensitive nature of this right. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020); *Robinson v. Attorney General*, 957 F.3d 1171 (11th Cir. 2020). In addition, those cases did not involve state actions designed to reduce the risk of COVID-19 transmission from communal gatherings and interactions, unlike here. *Adams*, 956 F.3d at 918; *Robinson*, 957 F.3d at 1181-82. And in both cases, the courts doubted the states' asserted interests in preserving personal protective equipment based on the limited amount used in the abortion context and in eliminating of the risk of transmission given the controlled nature of the clinical environment. *Adams*, 956 F.3d at 928; *Robinson*, 957 F.3d at 1181-82.

Plaintiffs' reliance on *Ex parte Milligan*, 71 U.S. 2 (1866), OB 60-62, is also misplaced, as that case concerned the suspension of the writ of habeas corpus during a time of war when there was a trial by jury available. *Milligan* simply had no occasion to consider what measures might be justified in response to the exigencies of a global pandemic. *See Adams*, 956 F.3d at 927 ("[W]e do not mean to suggest that [constitutional] rights during a public health crisis are identical to [constitutional] rights during normal times. If *Jacobson* teaches us anything, it is that context matters.") (citing *Milligan*).

c. Plaintiffs' Newly Asserted Discriminatory Enforcement Theory Should Be Rejected.

Plaintiffs raise an entirely new theory on appeal: that, in light of the widespread protests that erupted on May 27 after a police officer killed an African-American man in his custody, the State's directives have been enforced in a discriminatory fashion against places of worship. OB 26-27, 36-39. That claim and the evidence supporting it were not presented to the district court and should not be considered by this Court in the first instance.

As a federal court of appeals, this Court is "court of review, not first view." *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) (internal quotation marks omitted). It is therefore well-established that it is "inappropriate" for this Court to decide "issues that have arisen after the issuance of the preliminary injunction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 799-800 (9th Cir. 2005) (*per curiam*); *see also Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[W]e will not consider arguments that are raised for the first time on appeal."). That rule carries particular force here, given the deference due to the district court's denial of a TRO. *See Puente Arizona*, 821 F.3d at 1103.

Relatedly, the record on appeal is limited to the "original papers and exhibits filed in the district court," transcripts, and a certified copy of docket entries. Fed. R. App. P. 10(a); 9th Cir. R. 10-2. And a party may not "unilaterally supplement

the record" with evidence not reviewed by the district court. *Lowry*, 329 F.3d at 1024–25 (internal quotation marks omitted).

Those principles apply with special force to Plaintiffs' newly asserted theory of selective enforcement, OB 36-39, because that inquiry under the Free Exercise Clause is highly fact-based and dependent on factual rulings and determinations made by the trial court. *See Stormans*, 794 F.3d at 1083-84 (examining the record on appeal and the trial court's factual findings to determine selective enforcement); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167-72 (3d Cir. 2002) (same); *Brown v. City of Pittsburgh*, 586 F.3d 263, 296 n.41 (3d Cir. 2009) (deeming claim of selective enforcement as "fact-intensive"); *cf. also Lacey v. Maricopa Cty.*, 693 F.3d 896, 920 (9th Cir. 2012) ("The standard for proving discriminatory effect is a demanding one."). Plaintiffs' new theory depends on incomplete and untested evidence, and concerns protests that occurred *after* the district court's TRO denial. Moreover, Plaintiffs are inappropriately asking this Court to review that theory for the first time in this appeal without the benefit of the district court's factual determinations.

In addition, Plaintiffs embed in their Opening Brief evidence in support their newly asserted selective enforcement claim, including photographs, videos, and screenshots, that are not part of the appellate record. OB 26-27, 29, 36-39; *see also* OB 7, 9, 20, 30, 50-52, 54. Yet, tellingly, Plaintiffs have not moved this Court to

supplement the record under Federal Rule of Appellate Procedure 10(e), or made any formal request to include any of this new evidence. Especially as the district court has not yet had the opportunity to authenticate, admit, and consider any of that new evidence, or made any factual determinations based thereon, it should be disregarded by this Court.[23]

Even on the merits, Plaintiffs' discriminatory enforcement theory fails. It is not enough for Plaintiffs to allege that the COVID-19-related directives are not being enforced against secular activities like political protests; they must also demonstrate that the State is only or primarily enforcing them against places of worship. *See Stormans*, 794 F.3d at 1083; *Stormans v. Selecky*, 586 F.3d 1109, 1125 (9th Cir. 2009); *Tenafly Eruv Ass'n*, 309 F.3d at 167-68; *Calvary Chapel Lone Mountain*, 2020 WL 3108716, at *4. Plaintiffs, however, submit no evidence whatsoever that the State is enforcing the restrictions on worship services at all; they point only to bare allegations of local police enforcement in two other cases. OB 36 n.11. Even if they had presented such evidence, their theory would still fail because as a recent district court ruling recognizes, the recent protests raised concerns not present here. Enforcement of the prohibition against public

[23] Although this Court may consider new facts for jurisdictional purposes such as establishing mootness, *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1029 n.4 (9th Cir. 2018), these newly asserted facts and evidence concern the merits of Plaintiffs' claims.

gatherings have presented "serious public safety concerns that overcome otherwise valid considerations of public health." *PCG-SP Venture v. Newsom*, No. 20-1138 JGB, at 11 (C.D. Cal. June 23, 2020).

Thus, even if they had been properly raised, Plaintiffs' conclusory assertions that the State has enforced the restrictions on worship services but not on political protests would not establish discriminatory enforcement.

d. Even Under Strict Scrutiny, the State's Directives Pass Constitutional Muster.

Finally, even if, as Plaintiffs contend, strict scrutiny applied, their Free Exercise claim would still fail.

Plaintiffs concede that the State has a compelling interest in protecting the public from COVID-19's spread. OB 47. And the State's directives, which permit indoor worship services under a 100-person or 25% capacity cap and outdoor worship with no attendance limit, are narrowly tailored to serve that interest. As noted above, due to the asymptomatic transmission of the virus and the lack of a vaccine or widely effective treatment, measures limiting the size of group gatherings and physical contact are widely recognized as the only effective way to slow the spread of the virus. This comports with the CDC's guidance, which

recommends "taking steps to limit the size of gatherings" and "promot[ing] social distancing."[24]

Moreover, State public health officials have every reason to believe that indoor, in-person worship services pose a significant threat of spreading COVID-19. As Dr. Watt explained, in addition to being stationary in close quarters for extended periods during such services, congregants at religious services often speak aloud and sing, which increases the danger that infected individuals will project respiratory droplets containing the virus, and that individuals attending such services will become infected. ER 125-27.

In fact, one of the more unfortunate aspects of the current crisis is the way in which worship services have become "super-spreader" events. As is now well known, at the beginning of the pandemic, a religious service in South Korea led to over 5,000 infections,[25] and the first major event identified in the United States was a church choir practice in Seattle that led to 53 infections and two deaths.[26] Even

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[24] *See Interim Guidance for Communities of Faith*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/php/faith-based.html (last accessed June 24, 2020).

[25] https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/. News articles may be given probative weight for preliminary injunction determinations. *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

[26] https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm; https://www.businessinsider.com/coronavirus-cdc-says-washington-choir-session-53-cases-2-deaths-2020-5.

after the virus was identified and people began to engage in physical distancing and take other precautions, worship services have continued to cause outbreaks. For example, 71 infections have been traced to a single church service in Sacramento in March,[27] and church services on Mother's Day in rural California communities likewise caused COVID-19 outbreaks.[28] There are numerous other documented cases in which church services have spread the virus:

- More than 200 cases in rural Oregon have been traced to a church that recently held services with at least 100 people present.[29]
- Thirty-eight percent of people who attended a rural Arkansas church in March contracted COVID-19, which killed at least three.[30]

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[27] https://www.latimes.com/california/story/2020-04-02/pentecostal-church-in-sacramento-linked-to-dozens-of-coronavirus-cases.

[28] https://www.latimes.com/california/story/2020-05-18/mendocino-county-church-service-linked-to-coronavirus-cluster; https://www.sfchronicle.com/news/article/Butte-County-churchgoer-exposes-180-at-service-15276426.php; https://www.cnn.com/2020/05/19/us/california-church-pastor-coronavirus/index.html.

[29] https://www.wweek.com/news/state/2020/06/16/oregon-reports-278-covid-19-cases-another-record-as-outbreak-at-pentecostal-church-ravages-union-county/.

[30] https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm?s_cid=mm6920e2_w.

- Reopenings of churches in Texas,[31] Georgia,[32] Illinois,[33] Idaho,[34] Kentucky,[35] Canada,[36] and Germany[37] have resulted in COVID-19 outbreaks.

Given such reports, the risk posed by large, indoor, in-person worships services, even when physical distancing and other precautions are taken, cannot be denied.

Contrary to Plaintiffs' assertion, OB 57, California has searched for less restrictive alternatives. The State began cautiously by prohibiting all in-person public gatherings, but as it has gained further information about the spread of COVID-19 and obtained medical equipment and other resources needed to treat those infected, it relaxed the restrictions, first permitting in-person services of either 100 persons or 25% capacity and, second, permitting outdoor services without attendance limits.

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[31] https://www.washingtonpost.com/religion/2020/05/19/two-churches-reclose-after-faith-leaders-congregants-get-coronavirus/.

[32] https://www.christianpost.com/news/georgia-church-closes-two-weeks-after-reopening-as-families-come-down-with-coronavirus.html.

[33] https://thesouthern.com/news/local/as-more-places-begin-to-reopen-friday-jackson-county-experiences-covid-19-spike/article_8023b2e2-ca1c-5dc8-a46c-8e85c0288643.html.

[34] https://www.idahostatesman.com/news/coronavirus/article243274446.html.

[35] https://hoptownchronicle.org/church-whose-pastor-pressured-governor-to-allow-in-person-services-goes-back-to-online-worship-after-coronavirus-outbreak/.

[36] https://calgary.ctvnews.ca/i-would-do-anything-for-a-do-over-calgary-church-hopes-others-learn-from-their-tragic-covid-19-experience-1.4933461.

[37] https://www.latimes.com/world-nation/story/2020-05-29/germany-reopened-churches-offer-road-map-new-coronavirus-outbreak-shows-risks.

Plaintiffs assert that the restrictions on indoor, in-person worship services are overinclusive because several other states have not imposed attendance limits on such services. OB 58-59. But California was one of the first states hit by COVID-19, and Plaintiffs do not even suggest that the states they invoke face circumstances similar to those in California where, in the past month, the total number of infections has doubled from 94,000 confirmed cases to around 200,000, and, even more importantly, the number of new infections per day has more than doubled from nearly 2,200 to over 5,100.[38] Although California has managed to keep the fatality rate low,[39] this is no time to second-guess the State's public health officials and force it to loosen restrictions based on actions taken in other states facing different sets of circumstances.

Contrary to Plaintiffs' suggestion, OB 58, the State is not required to prove with certainty or through peer-reviewed studies that there is no less restrictive alternative that would protect the public. Where, as here, the State is dealing with a pandemic involving a poorly understood but nonetheless highly deadly and frequently fatal novel coronavirus, it is not required to wait until it is certain exactly what measures are necessary to protect the public. Indeed, were it to wait for such certainty, many lives would be lost in the interim. Where there is

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[38] United States COVID-19 Cases and Deaths by State, https://www.cdc.gov/covid-data-tracker/#cases (last accessed June 23, 2020).

[39] *Id.*

uncertainty over a deadly infectious disease, a State may err on the side of caution and adopt the least restrictive alternative that it believes, in its expert judgment, will provide adequate protection against the risk of infection. *See Jacobson*, 197 U.S. at 30. As this Court has recognized, the Bill of Rights is not "a suicide pact," and in a public health crisis a court must temper its "doctrinaire logic with a little practical wisdom." *South Bay II*, 959 F.3d at 939.

3. Plaintiffs' Remaining Claims Lack Merit.

Plaintiffs are also unlikely to succeed on the other claims that underlie their TRO application. In addition to failing under both *Jacobson* and strict scrutiny, as explained above, these claims fail for the reasons detailed below.

a. Substantive Due Process

Plaintiffs have asserted a substantive due process claim under the Fourteenth Amendment, but this claim is not materially different than Plaintiffs' Free Exercise Clause claim because it simply asserts that the orders at issue impinge on their "right to freely engage in worship." OB 44.[40] "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular

[40] Plaintiffs also assert that California has "started handing out 21-day licenses," "shut down all places of worship," and "dictat[ed] what type of worship is permissible." OB 45, 47. These assertions are unfounded: the State relaxed the attendance limits on worship services after 21 days when it issued the June 12 amendment to the guidelines—indeed, California now permits worship services subject only to attendance limits on indoor, in-person services—and Plaintiffs have not pointed to any way in which the State dictates the types of permissible worship.

sort of government behavior, the Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal quotation marks omitted). As Plaintiffs' right to free religious exercise is specifically protected by the First Amendment, a substantive due process analysis is inapposite.

Even if the Court were to perform an independent analysis of the substantive due process claim, the claim would still fail. Substantive due process "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). Plaintiffs have not alleged any government conduct that, in light of the current pandemic, "shocks the conscience," especially as Plaintiffs may now hold in-person for worship services. ER 29-30. And, like other rights, Plaintiffs right to gather for religious services may be temporarily restricted to protect public health. *See, e.g.*, *Prince*, 321 U.S. at 166-67.

b. Equal Protection

The Equal Protection Clause forbids the government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause

requires only that the classification rationally further a legitimate state interest unless "a [statutory] classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic[.]" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The restrictions at issue do not impinge on any fundamental right. As shown above, they do not violate the Free Exercise Clause, and while Plaintiffs assert that the restrictions violate the rights to free speech, assembly, and travel, OB 43, they do not even attempt to explain how. Plaintiffs also allege that the classifications of "essential" and "nonessential" workers and activities discriminate against them, but these distinctions do not implicate any suspect classifications, *see Nordlinger*, 505 U.S. at 21, and are rationally based on assessment of risk of transmission of COVID-19. Furthermore, since the Stay-at-Home Order in March, faith-based work has been treated as "essential" and exempted from the general stay-home requirement to provide worship opportunities through remote technology or drive-ins. ER 499, 551.

c. Religious Exercise Under State Law

Under the Eleventh Amendment, federal courts lack jurisdiction to enjoin state institutions and state officials on the basis of state law. *Pennhurst*, 465 U.S. at 124-125. The limited exception under which state officials may be enjoined from violating *federal* law does not apply "when a plaintiff alleges that a state

official has violated state law." *Pennhurst*, 465 U.S. at 106. Thus, as courts considering challenges to the Stay-at-Home Order have recognized, Plaintiffs' state claim, under Article 1, section 4 of the California Constitution, is barred the Eleventh Amendment. *E.g.*, *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022, at *7 (E.D. Cal. May 22, 2020); *Six v. Newsom*, No. 8:20-cv-00877-JLS-DFM, 2020 WL 2896543, at *8 (C.D. Cal. May 22, 2020). Far from suggesting otherwise, Plaintiffs limit their state claims to San Diego. OB 42.

C. The Balance of Equities Weighs Heavily Against Issuance of Injunctive Relief.

The district court's order should be affirmed for an additional, independent reason: Plaintiffs cannot show that the balance of equities weighs in their favor in light of the overwhelming public interest in slowing the spread of COVID-19 and preventing unnecessary infections and death. *See Winter*, 555 U.S. at 20; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge.").

The State does not question the sincerity of Plaintiffs' belief that it is essential to gather in person for worship services. But if there is any remaining burden on their constitutional rights, it is limited, as Plaintiffs may now hold indoor, in-

person worship services in groups of up to 100 persons or outdoors with no attendance limit.

Any such harm is far outweighed by the public's interest in slowing COVID-19's spread and protecting public health. Enjoining the State's 100-person or 25% capacity cap on indoor religious gatherings, as well as the other cleanliness and distancing restrictions set forth in the new guidelines, could result in indoor religious gatherings that number in the hundreds, thousands, or tens of thousands. This could have disastrous effects far beyond those individuals who would choose to attend such large worship services. As noted, one of the most unfortunate aspects of the current crisis is the way in which worship services have been transformed into "super-spreader" events resulting in dozens, hundreds and even thousands of new infections. *See* Section II(B)(2)(d), *supra*. Despite the obvious and serious risk to public health, in arguing about the balance of equities, Plaintiffs ignore the present public health emergency, which, as shown above, is currently getting worse. This Court should not make the same mistake. Nor should it credit Plaintiffs' assertions that they can resume services safely in groups that exceed the capacity cap when they fail to present any evidence supporting this assertion.

The right of Californians to practice their religion freely is of fundamental importance. Given the ongoing public health emergency, however, a TRO exempting religious and faith-based gatherings from the limited restrictions

imposed by the State would not be in the public interest, but instead would threaten the effectiveness of the State's prudent efforts to curb COVID-19's spread and protect the health and safety of all individuals in California.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot, or, in the alternative, affirm the district court's order.

Dated: June 26, 2020

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SA2020301266

STATEMENT OF RELATED CASES

The following case pending before this Court is related to the present matter because it also involves a challenge to the State's COVID-19-related guidelines for religious worship services: *Gish v. Newsom*, 9th Cir. No. 20-55445.

Dated: June 26, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,993 words excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Federal Rules of Appellate Procedure 32(a)(5) and (6).

Dated: June 26, 2020 *<u>/s/ Todd Grabarsky</u>*
TODD GRABARSKY

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system.

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

Dated: June 26, 2020 *<u>/s/ Todd Grabarsky</u>*
TODD GRABARSKY