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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No.: 20-cv-865-BAS

**Notice of Motion and Motion for
an Indicative Ruling Pursuant to
Fed. R. Civ. P. 62.1(a)(3)**

Judge: Cynthia Bashant

Dept: Courtroom: 4B

Date: August 10, 2020

Time: No Oral Argument Unless
Requested by the Court

ORAL ARGUMENT REQUESTED

**TO: THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
RECORD:**

PLEASE TAKE NOTICE that Plaintiffs South Bay United Pentecostal Church and Bishop Arthur Hodges III, by and through counsel, will and hereby do move for an indicative ruling that events occurring since its May 15, 2020 order on Plaintiffs' application for temporary restraining order, and order to show cause re: preliminary injunction, raise "substantial issues" which should be addressed by this Court in the first instance.

This motion is made on the grounds that good cause exists to grant the application because: (1) California's changes to its coronavirus regulatory scheme since May 15 constitute significant changes; (2) California's decision to not enforce that regulatory scheme against the "George Floyd" protestors constitutes a significant change; (2) the manner in which California's regulations burden Plaintiffs' religious rights has changed along with the regulations; and (4) subsequently published Supreme Court authority affects the analysis.

This motion is supported by the accompanying Memorandum of Points and Authorities, by the declaration of Charles S. LiMandri, Esq. and all exhibits attached thereto, by the supplemental declaration of Bishop Arthur Hodges III, by the briefing, original declarations, and requests for judicial notice submitted by Plaintiffs with their *ex parte* application for a temporary restraining order and order to show cause re: preliminary injunction, and by such further argument and evidence that may be adduced at any hearing on this matter.

Dated: July 10, 2020

By:

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**Memorandum of Points &
 Authorities in Support of Motion
 for an Indicative Ruling Pursuant
 to Fed. R. Civ. P. 62.1(a)(3)**

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INTRODUCTION

The fast-changing nature of the coronavirus pandemic has caused both sides in the pending appeal in the Ninth Circuit (No. 20-55533) from this Court’s May 15, 2020 order (Dkt. 32) to cite outside the record to an amazing degree.¹ It has also led the defendants—California and San Diego—to argue that Plaintiffs South Bay United Pentecostal Church’s and Bishop Arthur Hodges III’s claims are moot.²

As a result, after concerted deliberation, South Bay has decided to move in the Ninth Circuit for a “limited remand” to this Court, so that the record can be supplemented, and so that this Court can address in the first instance how the most up-to-date changes in California’s pandemic regime and enforcement of it affect its injunction analysis. Prior to granting a “limited remand,” however, the Ninth Circuit usually prefers some indication from the district court that it agrees that the new issues are “substantial” enough to warrant the remand—called an “indicative ruling.” Thus, Plaintiffs now move for an “indicative ruling” that these new issues are “substantial.”

PROCEDURAL HISTORY

Trying to keep up with the quick changes, both sides in the pending appeal have cited outside the record, and the Ninth Circuit has so far permitted it. For example, on Friday, May 22, 2020, Plaintiffs South Bay United Pentecostal Church and Bishop Arthur Hodges III moved for judicial notice of the White House press briefing of that date, as well as the updated CDC guidelines with respect to Houses of Worship, published on that date. 9th Cir. Dkt. 25. California opposed the motion, 9th Cir. Dkt. 27, but the Ninth Circuit granted it. 9th Cir. Dkt. 29, at 2.

Similarly, on Friday, June 22, 2020, both California and San Diego filed their own motions for judicial notice, seeking to provide the Ninth Circuit with the most

¹ See Cal. RB, 9th Cir. Dkt. 46, at 4 n.2, 5 nn.3–4, 12 nn.6–8, 38 n.17, 38 nn.18–19, 40 n.20, 42 n.21, 52 nn.24–26, 53 nn.27–30, 54 nn.31–37, 55 n.38.

² See S.D. RB, 9th Cir. Dkt. 45, at 1–3; Cal. RB, 9th Cir. Dkt. 46, at 19–26.

1 up-to-date coronavirus statistics and regulations. 9th Cir. Dkt. 47 (California); 9th
2 Cir. Dkt. 48 (San Diego). California also cited outside the record in its Respondents’
3 Brief, hyperlinking to numerous news articles and government statistics. 9th Cir. Dkt.
4 46, 4 n.2, 5 nn.3–4, 12 nn.6–8, 38 n.17, 38 nn.18–19, 40 n.20, 42 n.21, 52 nn.24–26, 53
5 nn.27–30, 54 nn.31–37, 55 n.38.

6 However, in their most recent briefs filed on Friday, June 26, both California
7 and San Diego criticized South Bay for relying on material outside the record. 9th
8 Cir. Dkt. 45, at 10–11; 9th Cir. Dkt. 46, at 27, 37 n.16, 40, 49–50. Both also argued
9 that the intervening developments had mooted South Bay’s appeal. 9th Cir. Dkt. 45,
10 at 1–3; 9th Cir. Dkt. 46, at 19–26.

11 In light of these arguments, after concerted deliberation, on Thursday, June 2,
12 2020, South Bay informed both California and San Diego during a telephone
13 conference that it was intending “to move for a ‘limited remand’ to the trial court, so
14 that Judge Bashant can decide in the first instance how (1) California’s present 100-
15 person cap; and (2) the George Floyd protests, affect Plaintiffs’ request for a
16 preliminary injunction.” (Ex. 1, at 3.) More recent developments also include
17 California’s July 6, 2020 ban on singing in places of worship, as well as several new
18 cases—including Supreme Court authority.

19 In light of California’s and San Diego’s arguments in their respective
20 Respondents’ Briefs, South Bay was hopeful that the parties could proceed through
21 the entire process with “joint motion[s]” (Ex. 1, at 4), but after the call, both
22 California and San Diego informed South Bay that they would oppose the limited
23 remand. (Ex. 1, at 1.) It is unclear why Defendants oppose limited remand—as
24 remand is essentially the relief they both requested in their Respondents’ Briefs.

25 Due to the short time in which South Bay is seeking a limited remand, it has
26 not had the opportunity to obtain an “indicative ruling” from this Court prior to
27 moving for a limited remand with the Ninth Circuit. Instead, South Bay has just filed
28 with the Ninth Circuit a motion for a limited remand, and is now moving in this

1 Court for an indicative ruling. *See SAS Inst. Inc. v. World Programming Ltd.*, No.
 2 LACV 18-00603-VAP (PJWx), 2018 WL 6843727, at *2 (C.D. Cal. Nov. 14, 2018)
 3 (“[A]s SAS has already applied to the Ninth Circuit for a limited remand to allow the
 4 Court to amend the September 5, 2018 Assignment Order, the Court finds it prudent
 5 to issue an indicative ruling.”).

6 LEGAL STANDARD

7 “The Supreme Court or any other court of appellate jurisdiction . . . may
 8 remand the cause and . . . require such further proceedings to be had as may be just
 9 under the circumstances.” 28 U.S.C. § 2106. As a result, “the courts of appeals often
 10 have retained jurisdiction while making a limited remand for additional findings or
 11 explanations.” 16 WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3937.1 (3d ed.
 12 2012) (citing *Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1147 n.2, 1150
 13 (9th Cir. 2006); *Miller v. United Food & Commercial Workers Union, Local 498, AFL-*
 14 *CIO*, 708 F.2d 467, 468 (9th Cir. 1983)); *see also Mujica v. AirScan Inc.*, 771 F.3d 580,
 15 584 (9th Cir. 2014); *Mohasco Indus., Inc. v. Lydick*, 459 F.2d 959, 960 (9th Cir. 1972).

16 “After the filing of a notice of appeal, a limited remand is often used to restore
 17 the district court’s jurisdiction for a particular purpose or period of time. Generally,
 18 the Ninth Circuit regains full jurisdiction after a specified time or upon a completion
 19 of some event.” 1 GOELZ ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL NINTH
 20 CIRCUIT CIVIL APPELLATE PRACTICE § 6:184 (2020). “No new notice of appeal is
 21 necessary to obtain review of issues raised before the district court on remand if the
 22 district court enters a nonappealable order that merely supplements the prior
 23 judgment then on appeal.” *Id.* at § 6:197 (italics omitted).

24 Although ordering a “limited remand” is within the Ninth Circuit’s inherent
 25 authority, and can be ordered *sua sponte*, *see Friery*, 448 F.3d at 1150; *Miller*, 708 F.2d
 26 at 468; *Mujica*, 771 F.3d at 584; *Mohasco*, 459 F.2d at 960, upon a motion by a party,
 27 “[t]he Ninth Circuit rarely remands a case to the district court” without “some
 28 indication the district would” invite remand. 1 GOELZ ET AL., *supra* at § 6:189. In this

1 context, the normal route would be to file a renewed motion for a preliminary
 2 injunction with the district court, Fed. R. Civ. P. 62.1, and with the court of appeal “a
 3 concurrent stay [of the] appeal or an extension of the briefing schedule.” 1 GOELZ ET
 4 AL., *supra* at § 6:191 (citation omitted).

5 The district court can then simply deny the motion if the new issues are wholly
 6 irrelevant or weak, or issue an order stating either that the new issues are substantial,
 7 and should be addressed by it in the first instance, or that the new issues are
 8 dispositive, such that the trial court would change its decision. Fed. R. Civ. P. 62.1(a).
 9 A latter such statement “is referred to as an ‘indicative ruling,’” which requests
 10 remand so that the district court can grant the renewed motion, or at least properly
 11 consider the “substantial issues” it raises. *Tribe v. United States Bureau of Reclamation*,
 12 319 F. Supp. 3d 1168, 1174 (N.D. Cal. 2018). This normal route, however, is not always
 13 required. *Mendia v. Garcia*, 874 F.3d 1118, 1121–22 (9th Cir. 2017). It is only required
 14 for the Clerk of the Court to grant remand on its own, as opposed to the Court of
 15 Appeal ordering a limited remand itself. 9th Cir. General Orders, App. A(18).

16 Because the Ninth Circuit only requires some indication that the District
 17 Court views the issues as “substantial,” some courts have granted parties’ joint
 18 motion/ stipulation for an indicative ruling. *See Keller v. NCAA*, No. C 09-1967 CW,
 19 2015 WL 8916392, at *3 (N.D. Cal. Dec. 15, 2015). And others have entertained *ex*
 20 *parte* requests for an indicative ruling. *See Scorpio Music (Black Scorpio) S.A. v. Willis*,
 21 No. 11-CV-01557-BTM(RBB), 2016 WL 7438325 (S.D. Cal. Dec. 27, 2016).

22 ARGUMENT

23 A limited remand is uniquely appropriate in this case. Both the Ninth Circuit
 24 and the Supreme Court have already weighed in on the propriety of urgent injunctive
 25 relief on the present record. *See S. Bay United Pentecostal Church v. Newsom*, 959 F.3d
 26 938 (9th Cir. 2020) (“*S. Bay I*”), *aff’d*, 140 S. Ct. 1613 (2020) (“*S. Bay II*”). Further,
 27 although the changes in the government’s regulatory scheme can be added to the
 28 record on appeal via judicial notice, it is much more difficult to add to the record

1 supplemental declarations explaining how those changes severely burden Plaintiffs. If
 2 the Ninth Circuit refuses to look outside the present record, a continuation of the
 3 appeal appears unlikely to result in a substantively different order than the ones
 4 already published by the Ninth Circuit and the Supreme Court.

5 Pursuant to this motion, Plaintiffs request that this Court consider whether the
 6 below materials would change its analysis—thus warranting the granting of
 7 preliminary injunctive relief, or at least being substantial enough for this Court to
 8 supplement its prior order. A plaintiff seeking a preliminary injunction must establish
 9 (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable
 10 harm without injunctive relief, (3) that the balance of harm tips in his favor, and
 11 (4) that a preliminary injunction is in the public interest. *All. for the Wild Rockies v.*
 12 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011). These factors are evaluated through a
 13 “sliding scale approach.” *Id.* at 1131. So, for example, “a stronger showing of
 14 irreparable harm to plaintiff might offset a lesser showing of likelihood of success on
 15 the merits.” *Id.*

16 The issues which South Bay believes are “substantial” include:

17 (1) The actions of the federal government on May 19 and 22, including the
 18 letter from California’s four U.S. Attorneys to Governor Newsom informing him that
 19 his treating worshippers less favorably than other groups was unconstitutional; and
 20 the President Trump’s press conference announcing that worship is an essential
 21 activity (Ex. 2, 3);

22 (2) California’s May 25 and San Diego’s May 27, 2020, changes in their
 23 regulations to permit worship services and political protests so long as the events do
 24 not exceed 100-persons or 25% of the area’s occupancy capacity (whichever is lower)
 25 (Ex. 4–6);

26 (3) San Diego’s June 3, 2020, letter to California requesting that worship
 27 services be allowed to exceed 100-person or 25% cap, because those restrictions are
 28 not necessary in San Diego (Ex. 7);

(4) The George Floyd protests beginning in San Diego on May 30, 2020, which numbered in the thousands of protestors, and California's and San Diego's statements that its pandemic restrictions would not be enforced against them;

(5) California's June 12 and San Diego's June 19, 2020, changes in its regulations to permit worship services and political protests without any restrictions so long as they occur outdoors—and not indoors (Ex. 8–10);

(6) California's July 6, 2020, changes in its regulations to ban singing or chanting at worship services or political protests that occur indoors (but not outdoors) (Ex. 11–12);

(7) San Diego's July 7, 2020 changes to its regulations to limit the time of day when restaurants can open, showing its regulations are distinct from California's (Ex. 13);

(8) The most up-to-date statistics on coronavirus infections and deaths, showing that California's refusal to enforce its restrictions against political protestors has caused a spike in infections, but no significant change in the number of hospitalizations or deaths;

(9) New case-law including *Our Lady of Guadalupe School*, *Espinoza*, and *Soos*;

(10) The Supplemental Declaration of Bishop Arthur Hodges III explaining how the above regulations severely burden Plaintiffs' exercise of their faith; and

(11) Other materials included in the briefing on appeal, better explaining how places of worship are similar to, or dissimilar to, other industries and activities.

1. California's Regulation of Worship Continues to Act as a Ban on Plaintiffs' Free Exercise of Religion

The first step in a Free Exercise analysis—under either the California or U.S. constitutions is whether the government conduct burdens Plaintiffs' free exercise of religion. As explained in the Supplemental Hodges declaration, the regulations here continue to so burden him and South Bay Pentecostal Church, to the point where they continue to effectively act as a ban on religious worship. *See* Supp. Hodges

1 Decl., ¶15 (“This requirement is essentially a ban on Pentecostal worship services.”)

2 **2. Strict Scrutiny is Required Because California’s Regulation of Worship**
 3 **Burdens Plaintiffs *because of* their Religious Practices**

4 This Court’s May 15, 2020, order held that California’s prohibition on
 5 worship services, along with many other events, was a neutral and generally
 6 applicable prohibition not requiring the application of strict scrutiny. Dkt. 32. The
 7 Court explained its reasoning as follows:

8 And it seems to me that a religious service falls within
 9 Stage 3 not because it’s a religious service, but because the
 10 services involve people sitting together in a closed
 11 environment for long periods of time. Thus, any burden
 12 placed by classifying church services as Stage 3 are not
 13 because of a religious motivation, but because of the
 14 manner in which the service is held, which happens to pose
 15 a greater risk of exposure to the virus. And I note, there’s
 16 lots of other things: The SATs; the California Bar exam;
 lots of other events that involve people sitting together in a
 closed environment for long periods of time that are also
 not being allowed to go forward.

17 Dkt. 38, Hearing Transcript, at 26. This reasoning no longer follows for two reasons.
 18 First, as shown above, California has issued unique regulations on worship and
 19 protest that do not apply to any other industry or group. Thus, it cannot say that it is
 20 promulgating a neutral regulation that applies to all.

21 Second, the Supreme Court has recently reaffirmed that where government
 22 conduct identifies religious conduct by name, strict scrutiny is necessarily required.
 23 In other words, California cannot ban worship, the SATs, and the bar exam, and later
 24 explain that all involve people sitting together indoors for long periods of time.
 25 Rather, to be neutral, its ban must simply state that it applies to all people sitting
 26 together indoors for long periods of time. Stated differently, saying “worshippers
 27 may not gather” is no different than—and equally repugnant as—saying “African-
 28 Americans may not gather.” Even if the government later identifies a purportedly

neutral explanation, classifying people based on a protected characteristic is always repugnant (and indeed, trying to come up with an explanation, such as preventing rioters from destroying private property, is equally repugnant). Therefore, the court does not look to that justification or whether it is a good fit—and immediately proceeds to a strict scrutiny analysis. “Status-based discrimination remains status based even if one of its goals or effects is” a valid, neutral goal. *Espinoza v. Montana Dep’t of Revenue*, --- S. Ct. ---, 2020 WL 3518364, at *7 (2020); *see also id.* at *9 (explaining that this is an “unremarkable” proposition, and citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

3. Strict Scrutiny is Required because of California’s Discriminatory Enforcement of its Regulation of Worship/Protest

A new issue which arose after this Court’s May 15, 2020, order concerns California’s discriminatory enforcement of its pandemic regulations. By permitting them to be “enforced in a discriminatory manner,” they are not generally applicable, and must satisfy strict scrutiny. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). “Faith-based discrimination can come in many forms.” *Roberts v. Neace*, 958 F. 3d 409, 413 (6th Cir. 2020).

Here, since May 25, California has nominally treated political protests and religious worship exactly the same—imposing a limit on gatherings at 25% of “building capacity” or “the relevant area’s maximum occupancy,” along with a maximum cap of 100 persons. (Ex. 4–6, 8–12.) Nevertheless, despite enforcing its restrictions against houses of worship,³ California has steadfastly refused to enforce

³ In two similar cases in California challenging Governor Newsom’s executive orders, *Abiding Place Ministries* and *Cross Culture Christian Center*, the factual record involved actual police enforcement, or threats of police enforcement, levelled against churches trying to reopen. *See* Verified Complaint, *Abiding Place Ministries v. Cty. of San Diego*, No. 20-cv-0683-BAS, 2020 WL 1881323 (S.D. Cal. Apr. 9, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-CV-00832-JAM-CKD, 2020 WL 2121111 (E.D. Cal. May 5, 2020). This is despite well-publicized statements by Governor Newsom and San Diego officials that no police enforcement would be forthcoming. (Trissell Decl., ¶¶ 9–11.)

1 its restrictions against political protests.

2 The same day that California created that regime—Monday, May 25, 2020—a
3 police officer in Minneapolis, Minnesota killed an African-American man in his
4 custody named George Floyd. The next day, a video-recording of the incident went
5 viral on social media, leading to protests in Minneapolis. The day after that,
6 Wednesday, May 27, protests erupted in cities across the country, including a protest
7 with hundreds of participants in Los Angeles. (Ex. 14.) These protests plainly
8 violated Governor Newsom’s ban on political protests exceeding 100 persons.

9 The next day, Saturday, May 30, 2020, the George Floyd protests reached San
10 Diego County. That day, a group of 1,000 protestors blocked the I-8 highway. This
11 protest also violated Governor Newsom’s 100-person cap on political protest. The
12 protests in San Diego continued daily for weeks. (Ex. 15.)

13 As stated above, the George Floyd protests in California have plainly violated
14 the Governors’ orders against protest and worship—violating the 100-person cap
15 through protests numbering in the thousands, but instead of trying to shut down
16 these unlawful gatherings, California encouraged them.

17 In response to the killing of George Floyd, on May 30 Governor Newsom
18 issued a press release “thank[ing] . . . community members who exercised their right
19 to protest peacefully and encouraged others to do the same.” (Ex. 16.) The next day,
20 Governor Newsom held a press briefing in which he again thanked and encouraged
21 the protestors and the protest organizers, stating: “To those who want to express
22 themselves . . . God bless you. Keep doing it. Your rage is real.” (Ex. 17.) “I just
23 again want to express my deep gratitude and my deep humility, to those leaders of
24 every stripe, that all across this state and all across our nation, are doing justice in this
25 moment, those demonstrators who are reaching out.” (Ex. 18.) “So I just want to
26 thank all the leaders, not only again assembled here, but throughout the state, once
27 again, for your courage, because now is a time for courage, now is a time for your
28 voice to be brought to the forefront.” *Id.* Further, when asked whether he was

1 worried that the protests would lead to a COVID-19 spike, Governor Newsom
 2 ducked the question and focused on the need for people to get tested if they are
 3 worried about exposure. *Id.*

4 Similarly, San Diego has refused to enforce its orders against the George Floyd
 5 protests. When Supervisor Nathan Fletcher was asked about them, he simply stated
 6 that when San Diegans “choose to express their First Amendment right, which is
 7 their right, then we hope that they do it as safely and responsibly as they can.”

8 (LiMandri Decl., ¶ 25; Ex. 19.) And San Diego law enforcement published a tweet
 9 about a protest exceeding the 100+ cap, stating “[w]e are *facilitating* this protest to
 10 ensure everyone remains safe.” (Ex. 20.) This facilitation, has led to thousands of
 11 people protesting, as shown in several videos obtained from Twitter. (Ex. 21–23.)

12 Thus, if concerned about the plight of African-Americans in our nation, or
 13 about the death of George Floyd, or about police brutality generally, Californians are
 14 de facto allowed to join a 1,000-person protest, but are not allowed to join with 101
 15 people to pray. (Cf. Ex. 24.) This is discriminatory enforcement, mandating strict
 16 scrutiny. *See* Ex. 25, 26 (letter and press release from DOJ stating that New York’s
 17 discriminatory enforcement was unconstitutional); *Soos v. Cuomo*, No. 1:20-cv-651
 18 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020) (enjoining New York
 19 Governor Cuomo and New York Mayor de Blasio from enforcing coronavirus
 20 regulations against places of worship differently from other places due to lax
 21 enforcement against political protestors); *Spell v. Edwards*, 962 F.3d 175, 180–83 (5th
 22 Cir. 2020) (Ho, J., concurring) (explaining how “the principle that freedom for me,
 23 but not for thee, has no place under our Constitution”).

24 **4. If *Jacobson* Applies, it is Only Minimally Relevant.**

25 Over a hundred years ago, the Supreme Court addressed whether the
 26 constitution protected an individual’s right to refuse the smallpox vaccine in
 27 contravention of a local ordinance—essentially a substantive due process claim.
 28 *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *Jacobson* explained

1 that governments can validly enact restrictions on substantive due process rights to
 2 stop the spread of diseases, but they cannot do so in “an arbitrary, unreasonable
 3 manner,” or in a way that “go[es] so far beyond what was reasonably required for the
 4 safety of the public.” *Id.* at 28.

5 *Jacobson* was decided before most modern constitutional jurisprudence and is
 6 therefore a bit of an outlier. But to date, the circuit courts have generally agreed to
 7 apply it with respect to some constitutional rights—specifically abortion rights.
 8 Notably, *Jacobson* was decided decades before the First Amendment was held to
 9 apply to the States by incorporation, and was not a case about regulations of
 10 churches. So it is not plain that it should apply in this case at all—despite this Court’s
 11 earlier application of it in its May 15, 2020, order. The conclusion that *Jacobson* does
 12 not apply to Free Exercise claims has been reached by at least one district court. *First*
 13 *Baptist Church v. Kelly*, --- F. Supp. 3d ---, 2020 WL 1910021, at *6 (D. Kan. 2020).
 14 When this issue was presented to the Ninth Circuit, the dissent vigorously argued
 15 against applying *Jacobson* to Free Exercise claims, and the majority conspicuously
 16 ignored *Jacobson* altogether. And when it was presented to the Supreme Court, only
 17 one justice approved of it. *See S. Bay I*, 959 F.3d 938, *aff’d*, *S. Bay II*, 140 S. Ct. 1613.

18 But if the Court continues to hold that *Jacobson* does apply, then there are two
 19 questions the Court must analyze. If the government does not have a satisfactory
 20 answer to either, the conduct is unconstitutional. Importantly, these questions must
 21 be analyzed in tandem with regular First Amendment jurisprudence which stresses
 22 that “First Amendment values are plainly jeopardized when litigation is made to turn
 23 on the resolution by civil courts of controversies over religious doctrine and
 24 practice.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, --- S.Ct. ---, 2020 WL
 25 3808420, at *9 n.10 (2020) (quoting *Presbyterian Church in U.S. v. Mary Elizabeth*
 26 *Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)) (ellipses omitted).
 27 Because such values are jeopardized, the high court has made clear that courts are
 28 forbidden from issuing legal opinions that have the effect of “resolving underlying

controversies over religious doctrine.” *Id.* (quoting *Presbyterian Church*, 393 U.S. at 449).

“In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of” the requirements of various faiths. *Id.* at *12. “It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.” *Id.* at *9 n.10 (quoting *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 715 n.8 (1976)). As a result, “[a] religious institution’s explanation of . . . the life of the religion in question is important.” *Id.* at *12. And in regular First Amendment jurisprudence, neither the government nor the courts may “tell the plaintiffs that their beliefs are flawed,” but “must accept the sincerely held [] objections.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, --- S.Ct. ---, 2020 WL 3808424, at *11 (2020).

Under *Jacobson*, the first question is whether the law “has no real or *substantial* relation to those objects” of protecting public health. *Jacobson*, 197 U.S. at 28. The second question is whether the law is an “invasion of rights secured by the fundamental law.” *Id.* Here, as explained more fully *infra* in § 4, neither California nor San Diego has convincingly explained why letting large numbers of people sit together indoors for eight hours at a factory or a school, but not for one-hour worshipping, provides a “real or substantial” benefit to curbing the pandemic. California has only ever asserted that the novel coronavirus is serious, and needs to be curbed. But that is not a sufficient answer—especially when California lets factories, potential hotbeds for coronavirus outbreaks, to operate without complying with the restrictions placed on churches.

More importantly, there is an especially “palpable invasion” of Plaintiffs’ Free Exercise rights here. Previously, this Court stated:

1 The order allows congregants to gather remotely: to gather
 2 over the phone, or via video conference, in person with
 3 members of the same household. It allows clergy to travel
 4 to churches to set up services for congregants to experience
 remotely.

5 The county now has opened to allow congregations to
 6 gather by car in drive-in style services as long as the
 7 physical distancing guidelines are followed and as long as
 people don't touch each other.

8 Individuals can practice religion in whatever way they wish
 9 as long as they're not sitting with each other in large
 10 groups inside.

11 Dkt. 38, at 28 (punctuation cleaned up). The problem is that *none* of that meets the
 12 requirements of Plaintiffs' faith. Physical, in-person worship services are required,
 13 not video-recorded or drive-in services. (Hodges Decl., ¶¶ 10–13, 19–23; Supp.
 14 Hodges Decl., ¶¶ 7–18.) Bishop Hodges and his congregants may also participate in
 15 the George Floyd protests, or go to a restaurant, or go to the mall—but that is also
 16 not required by their faith. As the Supreme Court recently explained, courts may not
 17 “tell the plaintiffs that their beliefs are flawed,” *Little Sisters of the Poor*, --- S.Ct. ---,
 18 2020 WL 3808424, at *11, and as a result, “[a] religious institution’s explanation of
 19 . . . the life of the religion in question is important.” *Our Lady of Guadalupe Sch.*, ---
 20 S.Ct. ---, 2020 WL 3808420, at *12 n.10; *see also Berean Baptist Church v. Cooper*, ---
 21 F. Supp. 3d ---, 2020 WL 2514313, at *7 (E.D.N.C. 2020) (“Again, the question
 22 becomes: who decides whether a religious organization or group of worshipers
 23 correctly determined that their religious beliefs dictated the need to have more than
 24 10 people inside to worship? Under EO 138, the answer is [the government]. This
 25 court has grave concerns about how that answer comports with the Free Exercise
 26 Clause.”).

27 ///

28 ///

1 **5. The Ban on Plaintiffs’ Free Exercise of Religion is not Narrowly Tailored**

2 Given that California’s regulation of worship burdens Plaintiffs’ free exercise
3 of religion, it can only stand if it satisfies “the strictest scrutiny.” *Trinity Lutheran*,
4 137 S. Ct. at 2019. “That stringent standard is not watered down but really means
5 what it says. To satisfy it, government action must advance interests of the highest
6 order and must be narrowly tailored in pursuit of those interests.” *Espinoza*, --- S. Ct.
7 ---, 2020 WL 3518364, at *10 (cleaned up).

8 Here, California’s compelling interest is in protecting the public from COVID-
9 19’s spread. But the manner in which it is doing so does not meet the test of strict
10 scrutiny—and is therefore unconstitutional. As explained below, banning
11 worshippers from gathering and singing is not narrowly tailored to achieve the
12 Government’s objectives.⁴

13 **5.1. The Ban on Worship is *Underinclusive*.**

14 “It is not enough to show that the Government’s ends are compelling; the
15 means must be carefully tailored to achieve those ends.” *Sable Commc’ns of Cal., Inc.*
16 *v. FCC*, 492 U.S. 115, 126 (1989). “There must be a fit between the . . . ends and the
17 means chosen to accomplish those ends.” *Sorrell v. IMS Health, Inc.*, 564 U.S. 552,
18 572 (2011) (cleaned up). Thus, a law cannot be narrowly tailored to furthering a
19 compelling interest when it “fail[s] to prohibit nonreligious conduct that endangers
20 [its asserted] interests in a similar or greater degree” than the religious conduct. *See*
21 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). In
22 this context, the government must identify a compelling interest actually consistent
23 with its broad actions—exemptions and all. Unless it does so, the government is left
24 with discriminatory decrees that “leave[] appreciable damage to [its] supposedly vital

25 ⁴ California has not asserted that it simply has a compelling interest in more generally
26 protecting public health. If it did, this argument would also not be narrowly tailored.
27 In some areas, the suicide rate has spiked to the point where there are more deaths
28 from suicide than COVID-19. (Ex. 27.) And the medical literature is overwhelming
that exercising one’s faith during times of crisis is necessary for mental and physical
health. (*See, e.g.*, Ex. 28–33.)

1 interest unprohibited” which is fatal under strict scrutiny. *Id.* at 547.

2 Here, California has banned Plaintiffs’ worship to prevent the spread of the
3 coronavirus, but allows many other activities and industries to proceed. Therefore,
4 California cannot claim that stopping the spread of the coronavirus is a compelling
5 enough interest to unreasonably limit South Bay Pentecostal Church—there is no
6 compelling interest that requires unfairly limiting *only* churches but not other
7 facilities.

8 On this point, California has contended throughout this action that the Court
9 should not look to its Reopening Plan generally, but rather to its regulation of specific
10 types of gatherings. In other words, California contends that it is categorizing like
11 businesses alike, and not treating houses of worship any different than similarly
12 situated entities. This argument, however, is factually false.

13 California has constantly moved the ball concerning how it distinguishes the
14 gatherings that require specifically tailored restrictions, but to date, California has
15 identified five factors: (1) a long period of time (*i.e.*, distinct from early essential
16 shopping, where Californians were advised to obtain their necessities and quickly
17 depart); (2) a large number of distinct households (*i.e.*, distinct from workplaces that
18 generally have a smaller number of distinct households); (3) a shared experience (*i.e.*,
19 distinct from later permitted non-essential shopping, where individuals are present to
20 browse for themselves only); (4) loud and frequent vocalizations spreading aerosol
21 particles (*i.e.*, distinct from manufacturing and shopping that have large numbers of
22 distinct households, but generally not singing); and (5) lack of identified attendees
23 (*i.e.*, distinct from workplaces who track their employees’ attendance).

24 But these comparisons do not hold up under scrutiny. The comparison upon
25 which four dissenting justices and the Sixth Circuit seized is between churches and
26 shopping. As stated by Justice Kavanaugh, “Assuming all of the same precautions are
27 taken, why can someone safely walk down a grocery store aisle but not a pew?” *S.*
28 *Bay II*, 140 S. Ct. at 1615 (quoting *Roberts v. Neace*, 958 F. 3d 409, 414 (6th Cir.

2020)). Why is permitting shopping not “leav[ing] appreciable damage to [a] supposedly vital interest unprohibited?” *Lukumi*, 508 U.S. at 547. Previously, this Court held that “plaintiff has no evidence that similarly situated persons or businesses are treated differently.” Dkt. 38, at 29.⁵ But a subsequent development of the record refutes this conclusion.

It is plain that grocery stores and non-essential retail shopping primarily involve strangers, and do not involve pre-registered attendees. Further, the average grocery shopper takes 43 minutes to complete his shopping. (Ex. 34.) The average trip to the mall, for those aged 18–34, is 158.4 minutes. (Ex. 35.) The average person makes 1.6 trips to the grocery store every week. (Ex. 36.) And the average woman spends 399 hours shopping a year. (Ex. 37.) This all adds up, with Americans spending a collective 37 billion hours per year waiting in lines. (Ex. 38.) Under California’s current rules, one can take as long as one likes to complete their shopping. This results, as numerous Twitter videos demonstrate, in large gatherings. (Ex. 39–41.)

The only true distinction is that in shopping centers people are milling about, and so may not spend a significant amount of time next to a single person (except when waiting in line). But that is a distinction without a difference. As stated by California’s expert, “Coronavirus spreads easily. The virus ‘is thought to spread mainly from person to person through respiratory droplets,’ which often ‘land in the mouths or noses of people who are nearby.’” Opp. to App. to Justice Kagan, 2 (quoting Watt Decl., ¶ 9). In other words, what matters is that someone coughs or speaks next to someone else—not how long they spend together.

Further, this one distinction does not take into account other factors, which make shopping more dangerous than attending worship services. Previously, Dr. Delgado opined on the *relative* risk of shopping versus worship services. Dr. Delgado

⁵ Importantly, the placement of the burden of production on Plaintiffs was legally erroneous. See § 5.2, *infra*.

1 ultimately concluded that “the calculated risk of contracting COVID-19 at the house
 2 of worship is 0.25 or 25% the risk at the grocery store.” Delgado Decl., ¶¶ 14–22.
 3 This conclusion is not unique to Dr. Delgado. Rather, the general unsanitariness of
 4 grocery stores is widely known. (Exs. 42–43.) California has never provided a
 5 meaningful refutation of Dr. Delgado’s conclusions in that regard—presumably
 6 because it cannot.

7 Further, under California’s Stage 2a, which began on May 8, there was no limit
 8 on the number of people, or length of time spent, in factories. For example,
 9 Defendant Angell specifically identified that what could open was “manufacturing,
 10 which can include things like toys, *clothing*, other things.” (Trissell Decl., Ex. E, at
 11 28.) California is famous for its clothing manufacturing, and pictures of them show
 12 that they result in a gathering involving (1) a long period of time (presumably an eight
 13 hour shift); (2) a large number of distinct households; and (3) a shared experience.
 14 (Ex. 44.)⁶

15 Similarly, in California’s later Stage 2b, which began in May, restaurants could
 16 open with *no* capacity limit. On average, Americans expect to spend 60.2 minutes
 17 dining at a restaurant—essentially the same amount of time as the typical worship
 18 service. (Ex. 45.) But of course, diners can take as long as they want to eat their meal.
 19 Further, in a busy restaurant, most diners could also be expected to be strangers to
 20 those around them, and to speak loudly so as to be heard by their own party without
 21 wearing masks. The only difference between restaurants and worship would appear
 22 to be the size of the gathering, as some restaurants may be small—but plenty of
 23 restaurants can seat 100 guests or more. (Ex. 46.) As a result, restaurants are
 24 coronavirus epicenters (Ex. 47; 48), and lower courts are in broad agreement that
 25

26 _____
 27 ⁶ This news article was published before the pandemic. The use of facemasks appears
 28 to be due to the presence of fabric particles in the factory—not due to the pandemic.
 It is only used for illustrative purposes.

gatherings at restaurants are comparable to those at places of worship.⁷ Finally, most recently, California has announced that schools may reopen (Ex. 49), as well as fitness facilities (Ex. 50)—even though they two can serve as coronavirus spreaders. See Ex. 51; *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, ---Fed. Appx. ---, 2020 WL 3468281, at *3 (6th Cir. June 2020).

In this case, following Dr. Delgado’s protocol, treating South bay Pentecostal Church equally, and permitting it to hold worship services with no greater restrictions than other entities, would not jeopardize the public health. (Delgado Decl., ¶¶ 14–23.) Further, Bishop Hodges is committed to following the County of San Diego and the Center for Disease Control’s public health guidelines, including strict social distancing measures and wearing masks. He is not asking for special treatment; he is only asking for equal treatment.

Thus, based on this better developed record, California has “no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.” *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020).

5.2. California has not satisfied its burden of establishing *narrow tailoring*.

Under strict scrutiny, California “bears the burden of proving the constitutionality of its actions” and California does not get “the benefit of the doubt.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816, 818 (2000). California thus has the burden to prove that its laws further a compelling government interest and are narrowly tailored to achieve that end. As indicated *supra*, at note 5,

⁷ *E.g., Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *11 (N.D.N.Y. June 26, 2020); *Antietam Battlefield KOA v. Hogan*, No. 1:20-cv-01130, 2020 WL 2556496, at *9 (D. Md. May 20, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156, 2020 WL 2310913, at *8 (D. Me. May 9, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, at *6 (E.D. Cal. May 5, 2020); *Maryville Baptist Church v. Beshear*, No. 3:20-cv-278, 2020 WL 1909616, at *2 (W.D. Ky. Apr. 18, 2020).

1 this Court previously misallocated the burden, warranting a fresh look.

2 Under this burden, California must demonstrate that it seriously undertook to
3 consider other, less-restrictive alternatives and ruled them out for good reason,
4 meaning that it “considered different methods that other jurisdictions have found
5 effective.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014). Under its burden,
6 California “would have to show either that substantially less-restrictive alternatives
7 were tried and failed, or that the alternatives were closely examined and ruled out for
8 good reason.” *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016).

9 Here, there is no evidence that California engaged in these actions. Notably,
10 the only *evidence* actually submitted below by California was one expert declaration.
11 Watt Decl., ¶¶ 1–18. But that declaration merely established the undisputed fact that
12 gatherings can lead to COVID-19 outbreaks, and then provided examples of
13 outbreaks connected to “religious services, choir practices, funerals, and parties.”
14 Watt Decl., ¶ 15.

15 But that declaration does not answer the real question. There have been plenty
16 of outbreaks related to factories, such as the clothing factory depicted above. (Exs.
17 52–55.) What is California’s compelling interest in restricting churches, *but not*
18 factories or other industries? “There is ample scientific evidence that COVID-19 is
19 exceptionally contagious. But evidence that the risk of contagion is heightened in a
20 religious setting any more than a secular one is lacking.” *Tabernacle Baptist Church,*
21 *Inc. of Nicholasville v. Beshear*, --- F. Supp. 3d ---, 2020 WL 2305307, at *5 (E.D. Ky.
22 2020). Further, examples abound of less restrictive approaches that California has
23 neither tried nor considered:

24 Notably, 15 other Governors trusted the people of their
25 states and exempted religious gatherings from *any*
26 *attendance limitations* during this pandemic. The Governor
27 has failed to cite any peer-reviewed study showing that
28 religious interactions in those 15 states have accelerated the
spread of COVID-19 in any manner distinguishable from

1 non-religious interactions.

2 *Berean Baptist*, 2020 WL 2514313, at *9 (footnote omitted). Indeed, Illinois’ orders
 3 simply adopt California’s guidance and make the standards permissive, not
 4 mandatory. (Ex. 56.) California has no evidence that a permissive approach will not
 5 be sufficient. And San Diego itself has sent a letter to Governor Newsom stating that
 6 due to its “positive data results” it “believe[s] that religious facilities could be
 7 opened more broadly—beyond the 25% or 100 person cap provided we have another
 8 week of positive data.” (Ex. 7.) Further, many states have never had any state-wide
 9 shutdown whatsoever. (Ex. 57.)⁸ The COVID-19 rates in those states have been
 10 largely similar to California’s. (Ex. 58.) Other states have set their caps at 25%
 11 capacity or no more than 50 persons—leading to lawsuits. (Ex. 59–60.) And others
 12 have set the cap at 250 persons. (Ex. 61.) Why 50 or 250 and not 100? It is not clear,
 13 but it appears that the numbers have simply been arbitrarily picked.

14 Plaintiffs’ food distribution and Pentecost worship services met or exceeded
 15 the distancing and hygiene requirements California and San Diego deem sufficient for
 16 other industries. As such, there is no justification for restricting Plaintiffs in a manner
 17 disparate from those other industries.

18 California’s failure to tailor its Reopening Plan to closely fit the safety ends it
 19 espouses, and its failure to try other, less restrictive alternatives that it cannot
 20 demonstrate are not working in other jurisdictions across the country, defeats
 21 California’s satisfaction of its burden to prove narrow tailoring. “As the Government
 22 bears the burden of proof on the ultimate question of . . . constitutionality, [Plaintiffs]
 23 must be deemed likely to prevail unless the Government has shown that [its]
 24 proposed less restrictive alternatives are less effective than [unduly limiting
 25 Plaintiffs’ worship].” *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). It has not shown
 26

27 ⁸ This includes Arkansas, Iowa, Nebraska, North Dakota, South Dakota, Utah, and
 28 Wyoming. (See Ex. 56.) Wisconsin had a state-wide shut down, but it was lifted by its
 supreme court. *Wisconsin Legislature v. Palm*, 2020 WI 42.

1 as much.

2 **6. The Public Interest Favors an Injunction**

3 Much has been made over how California's refusal to apply its pandemic
4 restrictions to political protestors has caused a spike in infection rates. (Ex. 62 [LA
5 Mayor acknowledging connection].) However, despite this spike in infection rates,
6 the hospitalization and death rates have not meaningfully changed. (Ex. 63–64.)
7 Further, we now know that the coronavirus is not spread by asymptomatic carriers, and
8 so it is easy to prevent its spread through requiring individuals with symptoms to stay
9 home. (Ex. 65.)

10 Therefore, California's self-created spike is not a justification for further
11 curtailing Plaintiffs' rights.

12 **CONCLUSION**

13 The above new matters undoubtedly constitute "substantial issues"
14 warranting this Court's attention. Indeed, the court in *Soos* recognized that the
15 discriminatory enforcement of pandemic restrictions against worship only—and not
16 the George Floyd protesters—was enough to even overcome the *Jacobson* standard.
17 Thus, Plaintiffs respectfully request that this Court grant this motion for an
18 indicative ruling, inviting the Ninth Circuit to order a limited remand on the above
19 issues.

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21

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23 Dated: July 10, 2020

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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

**(Supplemental) Declaration of
 Bishop Arthur Hodges III in
 Support of Motion for an
 Indicative Ruling Pursuant to Fed.
 R. Civ. P. 62.1(a)(3)**

Judge: Cynthia Bashant
 Dep't: Courtroom: 4B
 Date: August 10, 2020
 Time: No Oral Argument Unless
 Requested by the Court

ORAL ARGUMENT REQUESTED

1 I, Bishop Arthur Hodges III, declare and state as follows:

2 1. I am a plaintiff in the this action. I am a resident of San Diego County,
3 California. I serve as Senior Pastor of South Bay Pentecostal Church, also a plaintiff. I
4 also serve as Superintendent for the SoCal District of the United Pentecostal Church
5 International.

6 2. I submit this supplemental declaration with respect to Plaintiffs' request
7 for injunctive relief enjoining California and San Diego from treating them less
8 favorably than other entities under their coronavirus pandemic regulations. This
9 declaration is meant to supplement my prior declaration dated May 11, 2020, and
10 available at Dkt. 12-2. As a result, I largely do not repeat the matters discussed in that
11 declaration. I have personal knowledge of the matters set forth below, and could and
12 would testify competently to them if called upon to do so.

13 3. I have served as Senior Pastor of South Bay United Pentecostal Church
14 for thirty-five years. I also oversee more than one-hundred Pentecostal churches
15 across Southern California, and more than two-hundred pastors and ministers.

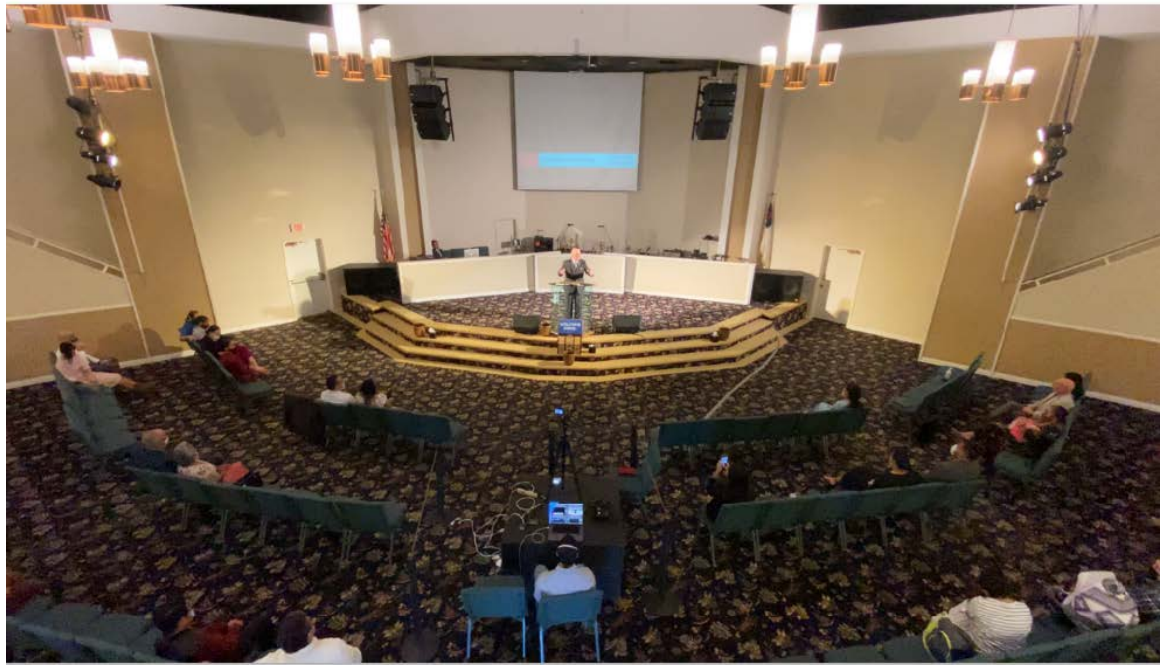
16 4. South Bay Pentecostal Church is a reflection of the Chula Vista
17 community. It is a multi-national, multi-cultural congregation. The majority of its
18 members are Hispanic, with the balance consisting of Filipino, Caucasian, African-
19 American, and other ethnic groups. It is an open and accepting community that
20 believes all humans are children of God.

21 5. Before the coronavirus pandemic, South Bay Pentecostal Church held
22 between three and five services each Sunday. The average attendance at some of
23 these services was between two-hundred and three-hundred congregants.

24 6. As the below photos demonstrate, South Bay Pentecostal Church
25 possesses a large sanctuary. The sanctuary can hold up to six-hundred people, and
26 provides ample room to accommodate the six feet of social distancing promoted by
27 national, state, and local regulations.



7. During the week following Monday, May 25, 2020, California and San Diego lifted the outright ban on worship services. As a result, the following Sunday, May 31 (Pentecost Sunday), South Bay Pentecostal Church held worship services with no more than 100 persons in attendance. Below are photos of those services:



1 8. To attend a Sunday worship service, South Bay Pentecostal Church
2 requires its congregants to reserve their place online. Every Sunday, South Bay
3 Pentecostal Church has had to turn numerous people away because we met the 100
4 person cap for each of our services. This is despite the fact that the sanctuary could
5 safely (with social distancing) accommodate more than 100 persons.

6 9. Each worship service requires the participation of least 30
7 volunteers/staff to be held. Such individuals serve as parking lot attendants, members
8 of the COVID-safe intake team, security, cleaners between services, ushers, greeters,
9 musicians, singers, and video/audio projection operators. Many of our volunteers and
10 staff are elderly or high-risk, and so South Bay Pentecostal Church has asked them to
11 not participate. This, however, has limited our ability to hold multiple services.
12 Presently, South Bay Pentecostal Church has been holding, and cannot feasibly hold
13 more than, three worship services each Sunday. If we had the resources and staffing
14 to hold more services, we would, but we presently do not have the ability to do so.

15 10. As stated at length in my original declaration dated May 11, 2020, South
16 Bay Pentecostal Church has a complex theology, based on Sacred Scripture, relating
17 to the requirement that “all” of its congregants gather together. California’s present
18 regulations continue to burden those religious beliefs, by preventing “all” to gather.
19 *See* Dkt. 12-2 (citing Hebrews 10:25; Acts 1:8, 2:1, 2:42, 2:46–27). These religious
20 requirements disfavor multiple worship services, by preferring that the entire
21 congregation meet at once. For example, it would be like holding a family reunion in
22 three sessions, with one-third of the family gathering at each session, but not being
23 allowed to meet the rest of the family gathering in the other sessions.

24 11. South Bay Pentecostal Church’s religious requirements also permit of,
25 and encourage, congregants to attend multiple worship services—which many
26 normally do. Nevertheless, because the interplay of California’s regulations and the
27 nature of our worship services limits us to serving 300 people each Sunday (at three
28

1 worship services), we have had to limit congregants' ability to attend more than one
2 service per Sunday.

3 12. On June 12, 2020, after our opening brief on appeal noted that political
4 protests and worship services were treated the same under California's regulations—
5 but in practice certain political protests were entirely exempt from those
6 regulations—California modified them. Under the June 12 regulations, there are no
7 restrictions on protest or worship, so long as it occurs outdoors, not indoors.

8 13. Regardless of whether this regulation was motivated by good or bad
9 intent, it does not help South Bay Pentecostal Church. We do not have any place
10 where we can meet outdoors. More problematically, as stated in my original
11 declaration, our theology requires approaching the altar at the end of each service and
12 performing baptisms (both with social distancing). Our altar and baptistery is in our
13 sanctuary auditorium, which is indoors.

14 14. On July 6, 2020, in addition to the above restrictions, California
15 published regulations stating that “activities such as singing and chanting negate the
16 risk-reduction achieved through six feet of physical distancing. **Places of worship*
17 *must* therefore discontinue indoor singing and chanting activities.” (italics modified).

18 15. This restriction is particularly concerning because singing is at the very
19 heart of Pentecostal worship services. This requirement is essentially a ban on
20 Pentecostal worship services.

21 16. The ban on singing also makes little sense when applied to South Bay
22 United Pentecostal Church, since all of our congregants wear masks. Further, as I
23 explained previously, since the closure orders were put in place, South Bay
24 Pentecostal Church has worked with the Chula Vista Police Department to develop a
25 drive-through food distribution system staffed by volunteers wearing masks and
26 gloves. During any given week, the South Bay Pentecostal Church distributes
27 between three and twelve tons of food. Below is a photograph of the food distribution
28 service in action:



17. Due to that experience, I was confident that South Bay Pentecostal Church could resume worship services safely and without incident. So far, my confidence has proven correct. Despite regularly testing our staff and volunteers, we have yet to receive a positive test for the coronavirus. We also encourage our congregants to notify us if they test positive for the coronavirus, and we unaware of any congregant testing positive as a result of our worship services.

18. Thus, banning indoor worship singing—when it is most likely outdoor protest chanting and shouting, by many people not wearing masks, which has caused any spike in coronavirus cases—makes no logical sense.

I declare until penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed on July 9, 2020.

- 
Bishop Arthur Hodges III

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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No.: 20-cv-865-BAS

**Request for Judicial Notice in
 Support of Motion for an
 Indicative Ruling Pursuant to Fed.
 R. Civ. P. 62.1(a)(3)**

Judge: Cynthia Bashant
 Dept: Courtroom: 4B
 Date: August 10, 2020
 Time: No Oral Argument Unless
 Requested by the Court

ORAL ARGUMENT REQUESTED

NOTICE OF MOTION AND MOTION

TO: PLAINTIFFS AND THEIR ATTORNEY(S) OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs South Bay United Pentecostal Church and Bishop Arthur Hodges III respectfully submit a Request for Judicial Notice of the following exhibits to the LiMandri declaration:

- **Exhibit 2:** letter from Eric S. Dreiband, and California's four U.S. Attorneys to Governor Newsom, dated May 19, 2020.
- **Exhibit 3:** transcript of President Trump's May 22, 2020, remarks on the necessity of Governors permitting worship services to continue.
- **Exhibit 4:** California's coronavirus industry guidance for places of worship, dated May 25, 2020.
- **Exhibit 5:** the relevant pages of California's Stay home Q&A page from the www.covid19.ca.gov website, as of May 25, 2020.
- **Exhibit 6:** San Diego County's Order of the Health Officer and Emergency Regulations, dated May 27, 2020.
- **Exhibit 7:** letter from Greg Cox, Chairman, San Diego County Board of Supervisors to Governor Gavin Newsom, dated June 3, 2020.
- **Exhibit 8:** California's coronavirus industry guidance for places of worship, dated June 12, 2020.
- **Exhibit 9:** the relevant pages of California's Stay home Q&A page from the www.covid19.ca.gov website, as of June 12, 2020.
- **Exhibit 10:** San Diego County's Order of the Health Officer and Emergency Regulations, dated June 19, 2020.
- **Exhibit 11:** California's coronavirus industry guidance for places of worship, dated July 6, 2020.
- **Exhibit 12:** the relevant pages of California's Stay home Q&A page from the www.covid19.ca.gov website, as of June 6, 2020.
- **Exhibit 13:** San Diego County's Order of the Health Officer and Emergency Regulations, dated July 7, 2020.

- **Exhibit 16:** the press release titled *Governor Newsom Statement on Demonstrations across California and the Passing of Federal Officer*, published by the office of Governor Newsom, dated May 30, 2020.
- **Exhibit 18:** the transcript of Governor Newsom's June 1, 2020, remarks regarding the George Floyd protestors.
- **Exhibit 25:** the Department of Justice's press release titled: Statement from Assistant Attorney General Eric Drieband and U.S. Attorney Matthew Schneider on New York City's Reopening Plans," dated June 22, 2020.
- **Exhibit 26:** letter from Assistant Attorney General Eric Drieband to New York Mayor Bill de Blasio dated June 19, 2020.
- **Exhibit 51:** abstract of the journal article *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, CDC Research Letter, dated August 2020.
- **Exhibit 58:** printout of the CDC website page *Cases in the US*, as of June 3, 2020.
- **Exhibit 64:** the webpage *Key Health Indicators*, National Center for Health Statistics, last modified April 20, 2020.

This motion is based on this Motion, the concurrently filed declaration of Charles S. LiMandri, the pleadings and papers on file herein, and upon such other matters as may be presented to the Court at the time of the hearing.

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INTRODUCTION

Plaintiffs South Bay United Pentecostal Church and Bishop Arthur Hodges III, by and through their attorneys, hereby request that the Court take judicial notice of various governmental orders, letters, press releases, statistics, and press conference statement, all of which are attached to the Declaration of Charles S. LiMandri.

LEGAL STANDARDS

“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). “The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information.” *Id.* at subd. (c)(2); *see also Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010) (abuse of discretion to not take judicial notice “when a party requests it and supplies all necessary information”).

Fed. R. Evid. 201 “deals only with judicial notice of ‘adjudicative’ facts.” Adv. Comm. Notes to Fed. R. Evid. 201(a). “Adjudicative facts are *simply the facts of the particular case*. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” *Id.* (italics added). Stated differently, “[a]djudicative facts are facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. By contrast, legislative facts do not relate specifically to the activities or characteristics of the litigants. A court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties.” *Qualley v. Clo-Tex Int’l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (quotation marks, brackets, and citations omitted).

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LEGAL ARGUMENT

Here, Plaintiffs ask that this Court take judicial notice of: state and local pandemic executive orders (Ex. 4–6, 8–13); letters and press releases published by local, state, and federal officials (Ex. 2, 7, 16, 25, 26), remarks of executive officials at press conferences (Ex. 3, 18), and various government statistics (Ex. 51, 58, 64). These are all properly judicially noticeable.

For example, “a court may take judicial notice of ‘matters of public record.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citing *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). Government documents that are public records are appropriate subjects for judicial notice. *See, e.g., Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 968 n.4 (9th Cir. 2008) (government documents on government website); *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932) (“[T]he court is bound to take notice of public facts . . . [and] public documents . . .”). In that regard, official acts of the executive branch may also be judicially noticeable. *See, e.g., Pratap v. Wells Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1104 n.1 (N.D. Cal. 2014); *Nat. Res. Def. Council v. McCarthy*, No. 16-CV-02184-JST, 2016 WL 6520170, at *2 (N.D. Cal. Nov. 3, 2016).

Courts also routinely hold that it is proper to take judicial notice of information and statistics collected by a government agency. Such information is treated under Rule 201 of the Federal Rules of Civil Procedure as facts from a governmental agency that are not subject to reasonable dispute. *See, e.g., Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571–72 (5th Cir. 2011) (“United States census data is an appropriate and frequent subject of judicial notice”); *Ibrahim v Department of Homeland Sec.*, 669 F.3d 983, 988–90 (citing extensively to federal reports by the Department of Homeland security, Department of Justice – Office of Inspector General, and Government Accountability office, as well as statements made at congressional hearings); *see generally Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012) (“The contents of an administrative agency’s

publicly available files . . . traditionally qualify for judicial notice”); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of materials on the websites of two federal agencies). *See also United States v. Chester*, 628 F.3d 673, 692 & n.4 (4th Cir. 2010) (taking judicial notice of records of the CDC); *Gent v. CUNA Mut. Ins. Soc’y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of records on the CDC’s website).

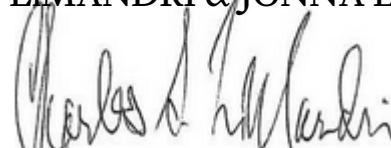
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court take judicial notice of the above-referenced governmental documents, all of which are attached to the Declaration of Charles S. LiMandri.

LiMANDRI & JONNA LLP

Dated: July 10, 2020

By:


 Charles S. LiMandri
 Paul M. Jonna
 Jeffrey M. Trissell
 Attorneys for Plaintiffs