

1
2
3
4
5
6
7
8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 SOUTH BAY UNITED PENTECOSTAL
13 CHURCH, *et al.*,

14 Plaintiffs,

15 v.

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

18 Defendants.
19

Case No. 20-cv-00865-BAS-AHG

**ORDER DENYING PLAINTIFFS’
RENEWED MOTION FOR A
TEMPORARY RESTRAINING
ORDER OR PRELIMINARY
INJUNCTION (ECF No. 53)**

20 **I. INTRODUCTION**

21 This case arises from the State of California’s efforts to limit the spread of the novel
22 severe acute respiratory syndrome-related coronavirus (SARS-CoV-2) that has upended
23 society. The illness caused by the virus, coronavirus disease 2019 (COVID-19), has killed
24 more than ten thousand people in California and sickened many more. There is no known
25 cure, widely available effective treatment, or approved vaccine for the disease. And
26 because people infected with the virus may be asymptomatic, they may unintentionally
27 infect others around them. Therefore, physical distancing that limits physical contact is
28 essential to slow the spread of the virus.

1 To ensure physical distancing, the Governor of California has issued a series of
2 restrictions on public gatherings. This case centers on the restrictions for in-person, indoor
3 religious worship services. Plaintiffs South Bay United Pentecostal Church and Bishop
4 Arthur Hodges III allege these restrictions violate their constitutional rights by limiting
5 their ability to freely exercise their religion.

6 An earlier version of California's restrictions prohibited Plaintiffs from holding any
7 in-person worship services. In May 2020, Plaintiffs asked the Court to enjoin those
8 restrictions while this case proceeded. After the Court denied Plaintiffs' request for
9 extraordinary relief, they appealed to the Court of Appeals for the Ninth Circuit and
10 concurrently requested an emergency injunction, which was denied. Plaintiffs next asked
11 the Supreme Court for emergency relief, but it, too, denied their request. Plaintiffs later
12 requested that their appeal be sent back to this Court to allow the Court to reconsider
13 whether California's restrictions should be enjoined in light of new developments. The
14 Ninth Circuit granted their request.

15 Now before the Court is Plaintiffs' renewed motion for a temporary restraining order
16 or preliminary injunction. In San Diego County, California's restrictions currently limit
17 Plaintiffs' indoor worship services to 25% of building capacity or 100 people, whichever
18 is fewer. The restrictions also forbid group singing and chanting indoors. Thus, the
19 challenged restrictions are more nuanced and lenient than the rules the Court previously
20 considered in May. Plaintiffs now argue, however, that California's "scientific
21 pronouncements" are "largely baseless," and that by "all reasonable scientific
22 measurements," the COVID-19 health emergency "has ended." (ECF No. 61 at 1:12–15.)
23 They also argue the State's restrictions treat certain secular businesses more favorably than
24 religious organizations and have been enforced in a discriminatory manner. Consequently,
25 Plaintiffs argue the restrictions regarding indoor worship services and singing are
26 unconstitutional and should be enjoined before trial.

27 California paints a different picture of the current circumstances. It stresses the crisis
28 is ongoing and filled with uncertainty. California highlights that COVID-19 infections and

1 deaths surged after the Court considered Plaintiffs’ first request to enjoin the State’s rules.
 2 And although Plaintiffs’ renewed motion cites that “[a]s of July 14, 2020, California ha[s]
 3 only reported a total of 7,227 deaths from COVID-19,” the State points out that this count
 4 had swelled to 12,407 as of August 31, 2020. (State’s Opp’n 9:18–21, ECF No. 57; *see*
 5 *also* Renewed Mot. 1:24–25, ECF No. 53-1.) California argues “these numbers are
 6 enormous, far greater than the number of people killed in the 9/11 terrorist attacks and
 7 those who lost their lives in Hurricane Katrina.” (State’s Opp’n 9:21–23.) The State also
 8 claims Plaintiffs “ignore the reason for why the State has been able to slow the spread of
 9 the disease: the imposition of the very types of public health restrictions that Plaintiffs ask
 10 the Court to enjoin.” (*Id.* 10:14–17.) “Enjoining restrictions because they have proven
 11 effective in curbing COVID-19 would be ‘like throwing away your umbrella in a rainstorm
 12 because you are not getting wet,’” the State argues. (*Id.* 10:26–28 (citing *Shelby Cty. v.*
 13 *Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting)).) Therefore, both California
 14 and the County of San Diego urge the Court to again refuse Plaintiffs’ request for
 15 extraordinary relief.

16 Ultimately, the Court concludes Plaintiffs have not met their burden to demonstrate
 17 they are entitled to a preliminary injunction—“an extraordinary remedy never awarded as
 18 of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Therefore, for the
 19 following reasons, the Court **DENIES** Plaintiffs’ renewed motion for a temporary
 20 restraining order or preliminary injunction.

21 **II. BACKGROUND**

22 **A. SARS-CoV-2**

23 Transmission. Although much remains uncertain about the novel coronavirus,
 24 “there is consensus among epidemiologists that the most common mode of transmission of
 25 SARS-CoV-2 is from person to person, through respiratory droplets such as those that are
 26 produced when an infected person coughs or sneezes, or projects his or her voice through
 27
 28

speaking, singing and other vocalization.” (Dr. Watt Decl. ¶ 27, ECF No. 57-2¹; *accord* Dr. Rutherford Decl. ¶ 28, ECF No. 57-3.²) The virus can also “live on certain surfaces for a period of time, suggesting that fomite transmission (through touching a surface where the live virus is present) is possible,” but this method of transmission “is not believed to be a common method by which individuals can be infected by the virus.” (Dr. Watt Decl. ¶ 29; *see also* Dr. Rutherford Decl. ¶ 30.) There is also “broad consensus that people who are not experiencing symptoms can still spread SARS-CoV-2.” (Watt Decl. ¶ 30; *see also id.* ¶ 31; Dr. Rutherford Decl. ¶¶ 20–32.) “Therefore, individuals who themselves may have been unknowingly infected by others can themselves become unknowing transmitters of the virus.” (Dr. Watt Decl. ¶ 32; *accord* Dr. Rutherford Decl. ¶ 27.)

¹ Dr. James Watt is the Chief of the Division of Communicable Disease Control of the Center for Infectious Diseases at the California Department of Public Health (“CDPH”). (Dr. Watt Decl. ¶ 2.) He received his doctor of medicine from the University of California, San Diego in 1993 and a master’s degree in public health from the University of California, Berkeley in 1995. (*Id.* ¶ 3.) Dr. Watt previously worked for the Centers for Disease Control and Prevention (“CDC”) as an Epidemic Intelligence Service Officer in the Respiratory Diseases Branch. (*Id.* ¶ 4.) He is also an Associate at the Johns Hopkins Bloomberg School of Public Health and a Clinical Professor at the University of California, San Francisco School of Medicine, where he teaches graduate students in public health and medical students about communicable disease control. (*Id.* ¶ 5.) His professional commendations include the U.S. Public Health Service Achievement medal in 2000, the National Center for Infectious Diseases Honor Award in 2001, and Outstanding Achievement Awards from the CDPH in 2015 and 2016. (*Id.* ¶ 8.) Dr. Watt has been “very involved” in the CDPH’s response to the COVID-19 pandemic, “working full time for approximately 60–70 hours per week to address the pandemic” from January 2020 to the date of his declaration. (*Id.* ¶ 15.) The Court addresses Plaintiffs’ objections to Dr. Watt’s declaration and other evidence below. *See infra* note 7.

² Dr. George Rutherford is the Salvatore Pablo Lucia Professor of Epidemiology, Preventive Medicine, Pediatrics, and History at the University of California, San Francisco School of Medicine. (Dr. Rutherford Decl. ¶ 4.) He also leads the Division of Infectious Disease and Global Epidemiology in the Department of Epidemiology and Biostatistics. (*Id.*) Further, Dr. Rutherford is an adjunct professor at the University of California, Berkeley School of Public Health. (*Id.*) He also serves as the “Director of Global Strategic Information Group in the Institute for Global Health Sciences at U.C. San Francisco.” (*Id.*) Dr. Rutherford received his doctor of medicine from the Duke University School of Medicine in 1978. (*Id.* ¶ 2.) He also received training in epidemiology in the CDC’s Epidemic Intelligence Service and spent ten years in various public health positions before entering academia. (*Id.* ¶ 3.) Since the novel coronavirus emerged, Dr. Rutherford has “devoted substantial time to researching and studying the virus” as part of his epidemiology roles and has “spoken extensively on topics related to the novel coronavirus and the disease it causes during 2020,” including through presentations to the California Medical Association and the California Health and Human Services Agency. (*Id.* ¶ 14.)

1 Gatherings. Group gatherings increase the risk of transmission of the virus. (Dr.
 2 Watt Decl. ¶¶ 37–43; *see also* Dr. Rutherford Decl. ¶¶ 47–52.) “The more people that
 3 gather, the higher the likelihood that an infected person will be present. Also, the larger
 4 the gathering, the higher the number of people who may be secondarily infected by that
 5 infected person.” (Dr. Watt Decl. ¶ 42; *see also* Dr. Rutherford Decl. ¶ 47.) “Evidence
 6 indicates the risk of transmission at a gathering increases when individuals are in close
 7 proximity to one another for an extended period.” (Dr. Watt Decl. ¶ 43.) The transmission
 8 risk also “increases with both the length of time the gathering lasts and the proximity of
 9 people to each other at the gathering.” (*Id.*)

10 Indoor Gatherings and Singing. Although gatherings increase the risk of
 11 transmission of the virus, this risk “is much higher when the gathering takes place indoors
 12 rather than outdoors.” (Dr. Watt Decl. ¶ 43; Dr. Rutherford Decl. ¶ 50 (“There is a lower
 13 risk of COVID-19 transmission when a group gathering takes place outdoors; there is a
 14 much decreased likelihood of aerosolized transmission of the virus outdoors because
 15 aerosolized particles will dissipate into the atmosphere.”).) There is also “scientific
 16 consensus that vocalization, even normal speech, produces aerosols, and that louder and
 17 more forceful expression such as singing and chanting produces more aerosols.” (Dr. Watt
 18 Decl. ¶ 45.) “Most scientists believe that group singing, particularly when engaged in while
 19 in close proximity to others in an enclosed space, carries a high risk of spreading the
 20 COVID-19 virus through the emission of infected droplets (which typically travel <6 feet)
 21 and aerosols.” (*Id.*; *see also* Dr. Rutherford Decl. ¶ 54 (explaining that engaging in
 22 “singing, chanting, shouting, and speaking loudly . . . in an indoor or enclosed space”
 23 increases the risk of transmission).)

24 Given the foregoing, religious “services and similar cultural events, particularly
 25 those taking place in an enclosed space, involve a heightened level of risk of COVID-19
 26 transmission.” (Dr. Watt Decl. ¶ 72; *accord* Dr. Rutherford Decl. ¶ 57.) “The
 27 characteristics of such events that cause the increased risk of transmission include: being
 28 indoors, bringing together a large group of people, having close proximity between

1 individuals, gathering for an extended duration, and having substantial singing and
 2 vocalizing that generally takes place at the events.” (Dr. Watt Decl. ¶ 72; *see also* Dr.
 3 Rutherford Decl. ¶ 57 (“Based on my knowledge, experience and study of the relevant
 4 publications, attending indoor worship services (and similar cultural events, which are
 5 included in this discussion) presents an exceptionally high risk of COVID-19 transmission
 6 because they involve a combination of many high risk factors”).)

7 COVID-19. “The virus can cause severe disease and death in individuals of any age.
 8 Older adults and people of any age who have serious underlying medical conditions are at
 9 higher risk for severe illness or death from COVID-19.” (Dr. Watt Decl. ¶ 22; *see also* Dr.
 10 Rutherford Decl. ¶¶ 40, 51.) “The symptoms of the disease are predominantly respiratory
 11 but many of those infected also experience non-respiratory symptoms.” (Dr. Rutherford
 12 Decl. ¶ 20; *see also* Dr. Watt Decl. ¶ 21.) “The disease typically starts as a fever and cough
 13 that progresses to respiratory distress and pneumonia in some individuals. In its most
 14 severe form it causes respiratory and/or myocardial failure.” (Dr. Rutherford Decl. ¶ 21.)
 15 “Currently there is no vaccine available in the United States and no generally effective
 16 treatment for COVID-19.” (*Id.* ¶ 36; *see also id.* ¶ 37 (noting that “[w]e have learned a lot
 17 about treatment of the novel coronavirus since the beginning of the pandemic and
 18 treatments have improved,” but “they are far from curative”); Dr. Watt Decl. ¶ 24.)

19 **B. South Bay Pentecostal Church**

20 Plaintiff South Bay Pentecostal Church “is a multi-national, multi-cultural
 21 congregation” located in Chula Vista in San Diego County, California. (Bishop Hodges
 22 Decl. ¶ 3, ECF No. 12-2.) Its congregation “represents a cross-section of society, from rich
 23 to poor and encompassing people of all ages.” (*Id.* ¶ 17.) Plaintiff Bishop Art Hodges III
 24 has served as the senior pastor of the Church for thirty-five years. (*Id.* ¶ 2.)

25 Typically, the Church holds “between three and five services each Sunday.” (Bishop
 26 Hodges Decl. ¶ 12, ECF No. 12-2.) “The average attendance at some of these services lies
 27 between two-hundred (200) and three-hundred (300) congregants.” (*Id.*) The Church’s
 28

1 “sanctuary can hold up to six-hundred (600) people.” (*Id.*) The Church “also perform[s]
2 baptisms, funerals, weddings, and other religious ceremonies.” (*Id.* ¶ 15.)

3 Bishop Hodges explains that “singing is at the heart of our worship services, and
4 comprises 25–50% of our typical Pentecostal worship gathering experience at Church.”
5 (Bishop Hodges Decl. ¶ 3, ECF No. 53-2.) “In a Pentecostal Church worship service,
6 everyone is instructed and expected to sing praise to God, just as everyone is instructed
7 and expected to pray to God. In our worship services, praying, singing, and praising God
8 is not for spectators, it is for participants.” (*Id.* ¶ 10.) A service at the Church also
9 “concludes with fellowship both inside and outside the sanctuary.” (Bishop Hodges Decl.
10 ¶ 14, ECF No. 12-2.) Bishop Hodges further explains: “‘Zoom Meetings’ and other tele-
11 conferencing applications are inadequate substitutes [for in-person services] as they curtail
12 a minister’s ability to lay hands upon a congregant or perform a baptism. They also curtail
13 our congregation’s ability to approach the altar, which is central to our experience of faith.”
14 (*Id.* ¶ 20.)

15 **C. Stay-at-Home Order and First Motion for Injunctive Relief**

16 Executive Order N-33-20. On March 4, 2020, the Governor of California
17 proclaimed a State of Emergency in California because of the threat of COVID-19.
18 (Second Am. Compl. (“SAC”) ¶ 18, ECF No. 47; *see also* SAC Ex. 1-1, ECF No. 47-1.)
19 On March 19, 2020, the Governor issued Executive Order N-33-20, which states that to
20 protect the public’s health, “all individuals living in the State of California” are “to stay at
21 home or at their place of residence except as needed to maintain continuity of operations
22 of the federal critical infrastructure sectors.” (SAC Ex. 1-1.)³ California’s Public Health
23 Officer designated a list of “Essential Critical Infrastructure Workers.” (SAC Ex. 1-2.)
24 Included in that list were “[f]aith based services that are provided through streaming or
25

26 ³ The Court considers the public records and government documents attached to the Second
27 Amended Complaint because their authenticity is not questioned. The Court similarly grants the State’s
28 and Plaintiffs’ requests for judicial notice as to the contents of public records and government documents.
(ECF Nos. 57-7, 69.) *See, e.g., Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 969 n.4 (9th Cir. 2008).

other technology.” (*Id.* at 16.) Meaning, Plaintiffs could conduct services over online streaming video or teleconferencing, but not in person at the Church’s sanctuary. (*See id.*)

The State later released a “Resilience Roadmap” that categorized workplaces into four stages. (SAC Ex. 1-3.) The roadmap placed “religious services” in Stage 3, along with movie theaters, museums, and bars—instead of Stage 2, which included retail stores and dine-in restaurants. (*Id.*) The County of San Diego adopted the State’s restrictions, list of essential workers, and roadmap through a series of public health orders and emergency regulations. (*See* SAC Exs. 2-2, 2-3, 2-4.)

On May 8, 2020, Plaintiffs filed this action against various State and County officials.⁴ (ECF No. 1.) On May 11, 2020, Plaintiffs filed a First Amended Complaint raising 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 rights enumerated in Article 1, sections 1 through 4, of the California Constitution. (ECF No. 11.) Plaintiffs then moved for a temporary restraining order and an order to show cause regarding a preliminary injunction. (ECF No. 12.) Plaintiffs sought an injunction that would prevent the State and County “from enforcing . . . any prohibition on Plaintiffs’ engagement in religious services, practices, or activities at which the County

⁴ After changes to the pleadings and personnel, the Defendants are:

Name	Title
Gavin Newsom	Governor of California
Xavier Becerra	Attorney General of California
Sandra Shewry*	Acting Director of the CDPH
Wilma J. Wooten	Public Health Officer, County of San Diego
Helen Robbins-Meyer	Director of Emergency Services, County of San Diego
William D. Gore	Sheriff of the County of San Diego

Plaintiffs sue all these Defendants in their official capacities. (SAC ¶¶ 10–15.) For simplicity, the Court collectively refers to the State of California officials as either “California” or the “State.” The Court also collectively refers to the County of San Diego officials as the “County” or “San Diego County.” *But see* U.S. Const. amend XI; 42 U.S.C. § 1983; *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

* The Court substitutes Sandra Shewry, the Acting Director of the CDPH, in place of Sonia Angell, the former official, who resigned. (*See* ECF No. 67 at n.1.) *See* Fed. R. Civ. P. 25(d).

1 of San Diego’s Social Distancing and Sanitation Protocol and Safe Reopening Plan is being
2 followed.” (ECF No. 12-1 at 25:10–14.)

3 Prior Ruling. On May 15, 2020, the Court denied Plaintiffs’ motion during a
4 telephonic hearing. (ECF No. 32.) The Court concluded Plaintiffs are unlikely to prevail
5 on the merits of their claims for several reasons. First, applying *Jacobson v.*
6 *Massachusetts*, 197 U.S. 11 (1905), the Court found that the State “may limit an
7 individual’s right to freely exercise his religious beliefs when faced with a serious health
8 crises” like that presented by COVID-19. (Mot. Hr’g Tr. 25:19–25, ECF No. 38.) The
9 Court reasoned: “The right to practice religion freely does not include the liberty to expose
10 the community to communicable disease or to ill health or death.” (*Id.* 26:1–3.)

11 Second, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.
12 520 (1993), the Court reasoned that the then-operative restrictions did not place a burden
13 on in-person worship services “because of a religious motivation, but because of the
14 manner in which the service is held, which happens to pose a greater risk of exposure to
15 the virus.” (Mot. Hr’g Tr. 26:9–25.) The Court highlighted that “the services involve
16 people sitting together in a closed environment for long periods of time.” (*Id.* 26:19–20.)
17 The Court further determined that Plaintiffs had “not demonstrated arbitrary exceptions to
18 [the] classification” level that included in-person worship services. (*Id.* 27:5–6.) The
19 Court also found the reopening restrictions were “rationally based on protecting safety and
20 stopping” the spread of the virus. (*Id.* 27:10–11.)

21 Third, the Court reasoned that, even if the equivalent of strict scrutiny applied to
22 Plaintiffs’ state constitutional free exercise claim, the restrictions were narrowly tailored
23 to further a compelling governmental interest—the State’s interest in protecting public
24 health. (Mot. Hr’g Tr. 27:12–28:17.) Finally, the Court determined Plaintiffs were
25 unlikely to succeed on their federal equal protection and due process claims. (*Id.* 29:18–
26 30:2.) And after further finding that neither the balance of equities nor the public interest
27 supported issuing a temporary restraining order, the Court denied Plaintiffs’ motion. (*Id.*
28 30:3–19.)

1 **D. Appeal and Changing Landscape**

2 Ninth Circuit. Plaintiffs appealed to the Ninth Circuit and filed an emergency
3 motion for an injunction that would allow them to hold in-person religious services pending
4 appeal. (ECF Nos. 35, 41–42.) On May 22, 2020, the Ninth Circuit denied Plaintiffs’
5 request. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). The
6 Ninth Circuit concluded Plaintiffs had “not demonstrated a sufficient likelihood of success
7 on appeal.” *Id.* at 939. It explained:

8 Where state action does not “infringe upon or restrict practices because of
9 their religious motivation” and does not “in a selective manner impose
10 burdens only on conduct motivated by religious belief,” it does not violate the
11 First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of*
12 *Hialeah*, 508 U.S. 520, 533, 543, (1993). We’re dealing here with a highly
13 contagious and often fatal disease for which there presently is no known cure.
14 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.” *Terminiello v. City of*
Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

15 *Id.* at 939. The Ninth Circuit also determined the remaining injunction factors “do not
16 counsel in favor of injunctive relief.” *Id.* at 940. Judge Collins dissented. *Id.* at 940–47.
17 He reasoned the State’s then-operative reopening plan is not facially neutral or generally
18 applicable, is subject to strict scrutiny, and does not pass muster under this standard. *Id.* at
19 943–46. On the last point, Judge Collins reasoned California’s “undeniably compelling
20 interest in public health” could be achieved through narrower restrictions that regulated the
21 “specific underlying risk-creating *behaviors*, rather than banning the particular *religious*
22 setting within which they occur.” *Id.* at 946–47.

23 On May 25, 2020, California issued guidelines that allow places of worship to
24 resume in-person services with limitations. (SAC Ex. 1-5.) The guidelines contain
25 instructions and recommendations for physical distancing during worship services as well
26 as cleaning and disinfection protocols, training for employees and volunteers, and
27 individual screening. (*Id.*) Further, while citing the increased risk of transmission of the
28 virus in an indoor setting, the guidelines limit attendance for in-person worship services

1 “to 25% of building capacity or a maximum of 100 attendees, whichever is fewer.” (*Id.* at
2 3.)

3 Supreme Court. When California relaxed its restrictions, Plaintiffs were seeking
4 emergency relief from the Supreme Court. (Grabarsky Decl. Ex. 6, ECF No. 57-1.) They
5 filed a supplemental brief to challenge the State’s May 25 guidelines. (*Id.* Ex. 7.) After
6 Justice Kagan referred Plaintiffs’ application for injunctive relief to the Supreme Court, the
7 Court denied it. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).
8 Chief Justice Roberts wrote an opinion concurring in the denial of the application. *Id.* at
9 1613–14. He reasoned:

10 Although California’s guidelines place restrictions on places of worship, those
11 restrictions appear consistent with the Free Exercise Clause of the First
12 Amendment. Similar or more severe restrictions apply to comparable secular
13 gatherings, including lectures, concerts, movie showings, spectator sports, and
14 theatrical performances, where large groups of people gather in close
15 proximity for extended periods of time. And the Order exempts or treats more
16 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.

17 *Id.* at 1613. The Chief Justice further explained:

18 The precise question of when restrictions on particular social activities should
19 be lifted during the pandemic is a dynamic and fact-intensive matter subject
20 to reasonable disagreement. Our Constitution principally entrusts “[t]he
21 safety and the health of the people” to the politically accountable officials of
22 the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U.S. 11,
23 38 (1905). When those officials “undertake[] to act in areas fraught with
24 medical and scientific uncertainties,” their latitude “must be especially
25 broad.” *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where
26 those broad limits are not exceeded, they should not be subject to second-
guessing by an “unelected federal judiciary,” which lacks the background,
competence, and expertise to assess public health and is not accountable to
the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469
U.S. 528, 545 (1985).

27 *Id.* Justice Kavanaugh dissented. He reasoned that indoor worship services are comparable
28 to “factories, offices, supermarkets,” and various other secular establishments that were

1 not subject to the same occupancy cap. *Id.* at 1614. And although “California undoubtedly
 2 has a compelling interest in combating the spread of COVID–19 and protecting the health
 3 of its citizens,” Justice Kavanaugh reasoned California’s restrictions discriminate against
 4 religion because the State lacks a compelling justification for distinguishing between
 5 worship services and the aforementioned secular businesses. *Id.* at 1615.

6 **E. Continued Developments and Limited Remand**

7 Singing Restrictions. After the Supreme Court’s decision, the State and County
 8 officials continued to “actively shap[e] their response to changing facts on the ground.”
 9 *See* 140 S. Ct. at 1614 (Roberts, C.J.). In early July, the State issued revised guidance that
 10 requires places of worship to “discontinue indoor singing and chanting activities” because
 11 such activities “negate the risk reduction achieved through six feet of physical distancing.”
 12 (SAC Ex. 1-9.) This prohibition on indoor group singing and chanting similarly applies
 13 to political protests, schools, and restaurants.⁵ (*See* Dr. Watt Decl. ¶¶ 88–90 (explaining
 14 why the State imposed restrictions on these activities and noting that other gatherings that
 15 involve “an elevated risk of COVID-19 virus spread through singing, chanting or similar
 16 activities, such as those at live concerts, live music venues, live theatrical performances,
 17 spectator sports, recreational team sports, theme parks and indoor protests, remain
 18 prohibited throughout the State”).)

19 July 13 Closure Order. Then, on July 13, 2020, due to the “significant increase in
 20 the spread of COVID-19,” the State issued an order re-imposing many previously relaxed
 21 restrictions on indoor activities. (SAC Ex. 1-13.) In addition, for those counties on the
 22 State’s “County Monitoring List,” which are those the State believed showed “concerning
 23 levels of disease transmission, hospitalizations, insufficient testing, or other critical
 24

25 ⁵ (Gabrasky Decl. Ex. 14 (providing “singing and chanting activities are discontinued” for “indoor
 26 protests”); Ex. 15 (providing “[a]ctivities where there is increased likelihood for transmission from
 27 contaminated exhaled droplets such as band and choir practice and performances are not permitted” and
 28 any activities “that involve singing must only take place outdoors”); Ex. 16 (providing restaurants “must
 discontinue” concert or performance-like entertainment “until these types of activities are allowed to
 resume”).)

1 epidemiological markers,” the order closed various indoor businesses, as well as “places
2 of worship.” (*Id.*)

3 Limited Remand. Meanwhile, on July 10, 2020, while Plaintiffs’ interlocutory
4 appeal was pending, Plaintiffs moved this Court for an indicative ruling to revisit its denial
5 of their initial motion. (ECF No. 45.) The Court granted their request, reasoning it raised
6 a substantial issue. (ECF No. 46.) Plaintiffs then filed their Second Amended Complaint.
7 (ECF No. 47.) And on July 29, 2020, the Ninth Circuit remanded the appeal “for the
8 limited purpose of permitting the district court to consider Plaintiffs’ request in light of the
9 events and case law that have developed since May 15, 2020.” (ECF No. 49.)

10 Four-Tier System. On August 10, 2020, Plaintiffs filed their renewed motion for a
11 temporary restraining order or a preliminary injunction. (Renewed Mot., ECF No. 53.)
12 While the motion was being briefed, circumstances again changed. On August 28, 2020,
13 due to “increased knowledge of disease transmission vulnerabilities and risk factors,” the
14 State established a new four-tier system for reopening, which superseded the State’s July
15 13 order. (Grabarsky Decl. Exs. 50–53.) Under this four-tier system, which is more
16 nuanced than the State’s prior restrictions, lower-risk activities and sectors are permitted
17 to resume sooner than higher-risk ones based on a series of “risk criteria.” These criteria
18 include the ability “to physically distance between individuals from different households,”
19 “to limit the number of people per square foot,” “to limit duration of exposure,” “to
20 optimize ventilation (e.g. indoor vs outdoor, air exchange and filtration),” and “to limit
21 activities that are known to cause increased spread” like singing and shouting. (*Id.* Ex. 51;
22 *see also* Dr. Rutherford Decl. ¶¶ 57–71 (discussing risks of indoor religious worship and
23 cultural events, grocery shopping, restaurant dining, and factories and whether those
24 environments involve the “heightened risk created by group singing”).)

25 Counties are assigned to a tier based on their reported COVID-19 case rate and
26 percentage of positive COVID-19 tests. (Grabarsky Decl. Ex. 50.) For example, Tier 2 is
27 the red-colored tier, which marks “substantial” risk of community disease transmission.
28 (*Id.*) The State placed San Diego County into this tier when Plaintiffs’ motion was being

1 briefed, and the County remains there now. (*Id.* Ex. 52-1.)⁶ In this tier, Plaintiffs again
 2 may hold indoor worship services up to 25% of building capacity or 100 persons,
 3 whichever is fewer. (*Id.* Exs. 52–23.) Indoor restaurants and movie theaters in the County
 4 are subject to the same attendance restrictions as worship services, but bars, wineries,
 5 cardrooms, concerts, sporting events, family entertainment centers, and theatrical
 6 performances remain either closed entirely or restricted to outdoor activities only. (*Id.* Ex.
 7 53.) Retail stores—except standalone grocers—are limited to 50% capacity indoors with
 8 modifications. (*Id.*) Non-critical office spaces are designated “remote,” and gyms are
 9 limited to 10% capacity indoors. (*Id.*)

10 The State and County filed oppositions to Plaintiffs’ renewed motion, and Plaintiffs
 11 filed a reply to each opposition. (State’s Opp’n, ECF No. 57; County’s Opp’n, ECF No.
 12 58; County’s Joinder, ECF No. 59; Reply to State’s Opp’n, ECF No. 61; Reply to County’s
 13 Opp’n, ECF No. 61-1.)⁷ Further, on September 4, 10, 11, and 14, and on October 1, 6, 7,
 14

15 ⁶ Although the facts underlying the State’s decision making with respect to its four-tier system
 16 may be subject to dispute, the fact that the State has placed and kept San Diego County in Tier 2 is not
 17 subject to reasonable dispute. See Blueprint for a Safer Economy—Current Tier Assignments as of
 18 October 13, 2020, <https://covid19.ca.gov/safer-economy/>; see also Fed. R. Evid. 201(b); *King v. Cty. of Los Angeles*, 885 F.3d 548, 555 (9th Cir. 2018) (taking judicial notice of “undisputed and publicly available information displayed on government websites”).

19 ⁷ Plaintiffs lodge 142 evidentiary objections to the evidence submitted by California and the
 20 County. (ECF No. 61-6.) Among raising other objections, Plaintiffs argue certain evidence is hearsay,
 21 irrelevant, “more prejudicial than probative,” or lacks foundation. (*Id.* at 1:12–142.) The State responds.
 22 (ECF No. 65.)

23 The Court overrules these objections. Evidence submitted in connection with a request for a
 24 preliminary injunction is not subject to the same requirements that would apply at trial. See *Flynt Distrib.*
 25 *Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); see also, e.g., *Johnson v. Couturier*, 572 F.3d 1067,
 26 1083 (9th Cir. 2009) (“A district court may, however, consider hearsay in deciding whether to issue a
 27 preliminary injunction.”); *Nat’l Rifle Ass’n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 926 (C.D.
 28 Cal. 2019) (“Because of the extraordinary nature of injunctive relief . . . a district court may consider
 evidence outside the normal rules of evidence, including: hearsay, exhibits, declarations, and pleadings.”);
Rosen Entm’t Sys., LP v. Eiger Vision, 343 F. Supp. 2d 908, 912 (C.D. Cal. 2004) (applying the Ninth
 Circuit’s reasoning in *Flynt* to objections to the defendant’s evidence). Rather, the evidence’s form
 impacts the weight it is given when the court assesses the merits of equitable relief. *Rosen*, 343 F. Supp.
 2d at 912. Indeed, the Court notes that both parties, including their proposed experts, routinely rely on
 various reported statistics for COVID-19. (See, e.g., SAC ¶¶ 105–112 (citing statistics prepared by
 California and the County); Cicchetti Decl. ¶¶ 17–19 (citing data from *Politico* and *The New York Times*);
 Dr. Delgado Decl. ¶¶ 7–14 (relying on CDC and non-governmental website data); *Lyons-Weiler* Decl. ¶¶

and 13, 2020, the parties filed notices of supplemental authority, all of which the Court has considered. (ECF Nos. 60, 62–64, 66–68, 70.)

III. LEGAL STANDARD

The standard for a temporary restraining order and preliminary injunction are “substantially identical.” *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). “A plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. The party seeking the injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). “A preliminary injunction is ‘an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.’” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

IV. ANALYSIS

Against this backdrop, the Court considers Plaintiffs’ renewed request for injunctive relief against the State and County officials. Plaintiffs tailor their renewed motion to their “Free Exercise Claims under the U.S. and California Constitutions.” (Renewed Mot. 8 n.4.) Therefore, the Court focuses its analysis on these claims.

Further, the Court analyzes these claims in light of the current restrictions that apply to the Church. As summarized above, San Diego County is in the State’s “red” tier—Tier 2. Thus, worship services may be held outdoors and include singing and chanting outdoors. Indoor worship services, however, are limited to up to 100 people or 25% of building capacity, whichever is fewer, and may not include singing or chanting. *See supra* Part II.E.

10–18, 27 (citing information from the European CDC and an assortment of news sources like *Bloomberg* and *US News and World Report*); Trissell Decl. Exs. A–C (appending CDC and County statistics); Dr. Watt Decl. ¶¶ 93–103; Dr. Rutherford Decl. ¶ 25.) To the extent the Court cites to evidence that Plaintiffs object to, the Court has determined Plaintiffs’ objections are meritless or the evidence deserves some weight at this stage notwithstanding concerns over its admissibility at trial.

1 Because Plaintiffs wish to hold indoor worship services that include group singing and
2 exceed the Tier 2 limit on attendees, the Court considers whether Plaintiffs have
3 demonstrated a likelihood of success on their claims that these restrictions violate their
4 federal and state constitutional free exercise rights. (See Renewed Mot. 6:25–7:6.)

5 At bottom, Plaintiffs’ renewed motion asks the Court to second guess decisions
6 made by California officials concerning whether COVID-19 continues to present a health
7 emergency and whether large indoor gatherings with singing pose a risk to public health.
8 Although not binding, the Court finds Chief Justice Roberts’s reasoning in this case to be
9 compelling. The background set forth above shows the State and County “are actively
10 shaping their response to changing facts on the ground.” See 140 S. Ct. at 1614 (Roberts,
11 C.J.). And the evidence demonstrates the COVID-19 pandemic remains an area “fraught
12 with medical and scientific uncertainties,” where the State and County’s latitude “must be
13 especially broad.” See *id.* at 1613 (quoting *Marshall*, 414 U.S. at 427).

14 Moreover, neither Plaintiffs’ evidence nor their arguments convincingly show that
15 the current restrictions exceed “those broad limits.” See 140 S. Ct. at 1613. Hence, the
16 Court finds Plaintiffs have not demonstrated a likelihood of success on the merits of their
17 free exercise claims. See *id.* at 1614 (“Where those broad limits are not exceeded, they
18 should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks
19 the background, competence, and expertise to assess public health and is not accountable
20 to the people.” (quoting *Garcia*, 469 U.S. at 545)). Consequently, Plaintiffs are not entitled
21 to the “extraordinary and drastic remedy” that is injunctive relief before trial. See *Lopez*,
22 680 F.3d at 1072 (providing the court should not issue a preliminary injunction “unless the
23 movant, by a clear showing, carries the burden of persuasion”); accord *City & Cty. of San*
24 *Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 789 (9th Cir. 2019).

25 The Court further expands upon its analysis below while addressing Plaintiffs’
26 claims that (i) COVID-19 no longer presents a public health emergency, (ii) the State’s
27 restrictions discriminate against places of worship, and (iii) the State’s restrictions have
28 been discriminatorily enforced.

1 **A. Public Health Emergency**

2 The Court previously reasoned that the State “may limit an individual’s right to
3 freely exercise his religious beliefs when faced with a serious health crises” like that
4 presented by COVID-19. (Mot. Hr’g Tr. 25:19–25, ECF No. 38 (citing *Jacobson v.*
5 *Massachusetts*, 197 U.S. 11 (1905).) In Plaintiffs’ renewed motion, they argue the
6 COVID-19 pandemic has stabilized in California, as the State “had only reported a total of
7 7,227 deaths” as of July 14, 2020. (Renewed Mot. 1:24–25 (citing COVID-19 Statewide
8 Update for July 15, 2020, SAC Ex. 5-3).) They also argue curbing the virus is no longer
9 “a compelling interest” given “the flattening of the death and hospitalization rates,
10 regardless of the infection rate,” as “numerous experts have concluded that the worst of the
11 pandemic is absolutely over.” (*Id.* 11:3–5.) Plaintiffs later argue that California’s
12 “scientific pronouncements” are “largely baseless,” and that by “all reasonable scientific
13 measurements,” the COVID-19 health emergency “has ended.” (Reply to State’s Opp’n
14 1:12–15.)

15 Plaintiffs’ position is not convincing. For one, arguments of counsel are
16 not evidence. *See, e.g., Carrillo-Gonzalez v. I.N.S.*, 353 F.3d 1077, 1079 (9th Cir. 2003).
17 In determining whether to grant extraordinary relief, this Court is not bound by Plaintiffs’
18 counsel’s interpretation of CDC statistics or what they believe is an acceptable death rate
19 for COVID-19 compared to other causes of death—many of which are not contagious and
20 are well-understood by the scientific community. (*See* Renewed Mot. 1:13–3:4; Reply to
21 State’s Opp’n 1:13–25; *see also* Dr. Watt Decl. ¶¶ 101–02.)⁸ Second, the State’s evidence
22

23 ⁸ Plaintiffs highlight that “the CDC updated its coronavirus statistics to reveal that for 94% of
24 coronavirus related deaths, ‘in addition to COVID-19, on average, there were 2.6 additional’
25 comorbidities.” (Reply to State Opp’n 1:15–22 (citing Trissell Decl. Ex. NN, ECF No. 61-5).) They
26 extrapolate this 94% statistic to determine a much smaller infection-fatality rate for those who “are healthy
27 and have no other comorbidities.” (*Id.* 1:21–22.) That characterization is problematic. The
28 “comorbidities” listed in the CDC’s data include not only common health conditions like obesity, diabetes,
and hypertension, but also conditions that COVID-19 *itself* can cause *before* death—like “pneumonia”
and “respiratory failure.” (Trissell Decl. Ex. NN at 5–6; *see also* Dr. Watt Decl. ¶ 21; Dr. Rutherford
Decl. ¶ 21 (“The disease typically starts as a fever and cough that progresses to respiratory distress and
pneumonia in some individuals. In its most severe form it causes respiratory and/or myocardial failure.”).)

1 regarding infections and deaths amply demonstrates that SARS-CoV-2 and COVID-19
 2 continue to present a public health emergency in California, including in the County of San
 3 Diego. (Dr. Watt Decl. ¶¶ 16–103; Dr. Rutherford Decl. ¶¶ 16–46.) Third, Plaintiffs’
 4 contrary evidence is not compelling. At best, Plaintiffs’ evidence confirms that “[t]he
 5 precise question of when restrictions on particular social activities should be lifted during
 6 the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement.”⁹
 7 *See S. Bay Church*, 140 S. Ct. at 1613 (Roberts, C.J.). And because Plaintiffs do not show
 8 “the broad limits” of the State and County’s discretion in this context are being exceeded,
 9 second guessing their decisions is not appropriate. *See id.*; *see also San Francisco*, 944
 10 F.3d at 789 (providing the court should not issue a preliminary injunction “unless the
 11 movant, *by a clear showing*, carries the burden of persuasion”). Accordingly, the Court
 12

13 The State, of course, has a compelling interest in protecting all of its residents from a communicable
 14 disease—including those residents with conditions like obesity and diabetes that may ultimately be
 15 “comorbidities” along with COVID-19.

16 ⁹ Compare Cicchetti Decl. ¶ 20, ECF No. 53-5 (claiming, as an economist, that there “is no
 17 scientific evidence that supports California continuing to restrict religious worship”), and Kauffman Decl.
 18 ¶ 14, ECF No. 53-6 (expressing that “[d]espite the state’s claim, there is no rational and legitimate
 19 scientific or public health basis supporting the sweeping breadth and scope of the State of California’s
 20 above-described closure mandate”), and Lyons-Weiler Decl. ¶ 29, ECF No. 53-7 (opining that the
 21 increasing cases in the United States “are not as large of a concern as they were in the beginning of the
 22 pandemic” because the “infection case fatality rate . . . is falling fast” and “COVID-19 is not the monster
 23 we initially thought it was”), and Dr. Bhattacharya Decl. ¶ 28, ECF No. 53-8 (estimating the “infection
 24 fatality rate is less than 0.2%” for “the non-elderly congregants,” whereas the mortality risk for those over
 25 seventy who contract the disease is “still small, with 98.7% of infected elderly people surviving the
 26 infection”), and Trissell Decl. Exs. D–F, ECF No. 69-1 (arguing that current lockdown policies are
 27 producing detrimental effects on short and long-term public health and “[t]he most compassionate
 28 approach that balances the risks and benefits of reaching herd immunity, is to allow those who are at
 minimal risk of death to live their lives normally to build up immunity to the virus through natural
 infection, while better protecting those who are at highest risk”), with Watt Decl. ¶¶ 93–103, ECF No. 57-
 2 (explaining that having “a single infectious disease as a top ranking cause of death signals a serious
 change” because “[i]nfectious diseases were commonly the top causes of death decades ago, but they have
 been replaced with chronic diseases more recently because our public health efforts have led to reductions
 in infectious disease”), and Dr. Rutherford Decl. ¶¶ 38–46, ECF No. 57-3 (opining that “the novel
 coronavirus pandemic calls for extraordinary measures to protect the population” not only because it
 causes serious illness or death, but also because there is “emerging evidence that the virus has serious
 lasting, and possibly long-term, effects on some individuals”), and Imrey Decl. ¶ 50, ECF No. 57-4
 (opining that “Dr. Bhattacharya’s seroprevalence-survey based claims of very low overall and age-specific
 COVID-19 infection fatality rates, generally and specifically in California, remain matters on which, for
 good reasons, there is no scientific consensus”).

1 rejects Plaintiffs’ claim that the State’s restrictions are unconstitutional because the
2 COVID-19 public health emergency has ended.

3 **B. Discriminatory Restrictions**

4 “Where state action does not ‘infringe upon or restrict practices because of their
5 religious motivation’ and does not ‘in a selective manner impose burdens only on conduct
6 motivated by religious belief,’ it does not violate the First Amendment.” *S. Bay Church*,
7 959 F.3d at 939 (quoting *Lukumi*, 508 U.S. at 532). In determining whether a law
8 discriminates against religion, courts compare the treatment of religious conduct and
9 “analogous non-religious conduct” and consider whether the governmental interests “could
10 be achieved by narrower ordinances that burden[] religion to a far lesser degree.” *Lukumi*,
11 508 U.S. at 546.

12 As mentioned, the Court’s decision to deny Plaintiffs’ initial request for injunctive
13 relief also rested on the Court’s determination that the then-operative restrictions did not
14 place a burden on in-person worship services “because of a religious motivation, but
15 because of the manner in which the service is held, which happens to pose a greater risk of
16 exposure to the virus.” (Mot. Hr’g Tr. 26:9–25.) The Court further determined that
17 Plaintiffs had “not demonstrated arbitrary exceptions to [the] classification” of restrictions
18 that included in-person worship services. (*Id.* 27:5–6.) Plaintiffs argue the revised
19 restrictions do not pass muster under Free Exercise Clause standards for an assortment of
20 reasons, including that the State’s four-tier system gives preferential treatment to secular
21 businesses like supermarkets, retail stores, and factories. (See Renewed Mot. 8:11–17:22.)

22 In resolving Plaintiffs’ free exercise arguments, the Court finds persuasive Judge
23 Bernal’s decision from the Central District of California that considered the same four-tier
24 system in *Harvest Rock Church, Inc. v. Newsom*, No. LACV 20-6414 JGB (KKx), 2020
25 WL 5265564 (C.D. Cal. Sept. 2, 2020), and the Ninth Circuit’s subsequent opinion, No.
26 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020). Judge Bernal denied Harvest
27 International Ministry and Harvest Rock Church’s comparable request for injunctive relief,
28 reasoning in part that they had not shown a likelihood of success on the merits of their free

1 exercise claims. 2020 WL 5265564, at *2–3. The plaintiffs appealed, and the Ninth
2 Circuit similarly denied their emergency motion to enjoin “California Governor Gavin
3 Newsom’s COVID-19 Executive Orders and related restrictions (Orders) as they apply to
4 in-person worship services.” 2020 WL 5835219, at *2. The Ninth Circuit explained:

5 We find that Harvest Rock has not shown a likelihood of success on its
6 argument that the district court abused its discretion by declining to enjoin the
7 Orders. The evidence that was before the district court does not support
8 Harvest Rock’s arguments that the Orders accord comparable secular activity
9 more favorable treatment than religious activity. The Orders apply the same
10 restrictions to worship services as they do to other indoor congregate events,
11 such as lectures and movie theaters. Some congregate activities are
12 completely prohibited in every county, such as attending concerts and
13 spectating sporting events. The dissent states that the restrictions applicable
14 to places of worship ‘do not apply broadly to all activities that might appear
15 to be conducted in a manner similar to religious services,’ but does not provide
16 support for this point. By our read the restrictions on theaters and higher
17 education are virtually identical.

18 Harvest Rock also contends that the Governor failed to provide a
19 rationale for the more lenient treatment of certain secular activities, such as
20 shopping in a large store. However, the Governor offered the declaration of
21 an expert, Dr. James Watt, in support of the claim that the risk of COVID-19
22 is elevated in indoor congregate activities, including in-person worship
23 services. Harvest Rock did not offer a competing expert or any other evidence
24 to rebut Dr. Watt’s opinion that congregate events like worship services are
25 particularly risky. Because the district court based its order on the only
26 evidence in the record as to the risk of spreading COVID-19 in different
27 settings, Harvest Rock is unlikely to show that the district court abused its
28 discretion.

29 *Id.* at *1.

30 The question, then, is whether the evidence before the Court points to a different
31 outcome than in *Harvest Rock*. It does not. As set forth above, the evidence shows that
32 the State’s restrictions are based on the elevated risk of transmission of the novel
33 coronavirus in indoor settings, particularly congregate activities and those involving
34 singing and chanting. See *supra* Part II.A, E. The restrictions are tailored to the State’s
35 understanding of the risk of certain activities and the potential spread of SARS-CoV-2, not

1 the targeted conduct’s religious motivation. *See S. Bay Church*, 959 F.3d at 939 (citing
 2 *Lukumi*, 508 U.S. at 532); *see supra* Part II.E. And the State has continued to fine tune its
 3 restrictions “to changing facts on the ground.” *See S. Bay Church*, 140 S. Ct. at 1614
 4 (Roberts, C.J.). (*See also* Dr. Watt Decl. ¶¶ 47–106.)

5 That said, unlike the *Harvest Rock* plaintiffs, Plaintiffs here submit evidence that
 6 includes a declaration from the medical director of a family medical group, Dr. George
 7 Delgado, who has “been intimately involved in planning for the current coronavirus disease
 8 . . . for [his] family medical group and hospice.” (Dr. Delgado Decl. ¶¶ 2–5, ECF No. 53-
 9 4.) Among other things, Dr. Delgado states, “I feel that going to one’s church, synagogue
 10 or mosque should be much safer than going to the grocery store, participating in a protest,
 11 or working at a manufacturing facility.” (*Id.* ¶ 14.) To support this statement in his
 12 supplemental declaration,¹⁰ Dr. Delgado sets forth a “comparative risk analysis” that states
 13 the risk of contracting COVID-19 at a house of worship is “0.125 or 12.5% the risk at the
 14 grocery store,” “0.01 or 1% the risk at public protests,” and “0.25 or 25% the risk at [a]
 15 manufacturing facility.” (Dr. Delgado Decl. ¶¶ 25, 33, 43.)¹¹

16 The State argues Dr. Delgado’s comparative risk assessment is both baseless and
 17 inadmissible for a litany of reasons. (State’s Opp’n 18:5–20:17.) The State also supplies
 18 the opinion of Peter B. Imrey, Ph.D., a Professor of Medicine at Cleveland Clinic and Case
 19 Western Reserve University. Imray explains why Dr. Delgado’s broad-brushed assessment
 20 that leads to precise probabilities of the risk of COVID-19 spread is not accepted as reliable
 21 in the relevant scientific community. (Imrey Decl. ¶¶ 31–40 (explaining that Dr. Delgado’s
 22 incomplete model “is unscientific” because it does not include supporting data and there is
 23 no “practical scientific basis” for “assessing the reliability of such numbers”). *See also*
 24 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993) (providing the court
 25

26 ¹⁰ Dr. Delgado provided a similar declaration in support of Plaintiffs’ initial motion for injunctive
 27 relief. (*See* Dr. Delgado Decl. ¶¶ 14–23, ECF No. 12-3.)

28 ¹¹ Although Plaintiffs’ other declarants make statements about the danger of COVID-19 to
 religious congregants and the broader public as part of the debate referenced above, *see supra* note 9, they
 do not provide this type of comparative risk assessment.

1 can consider whether a technique is acceptable in the relevant scientific community). In
 2 rebuttal to Imrey’s detailed critique, Dr. Delgado states that “there are presently no
 3 adequate models or methodologies to compare risks, and so I cite none” and that his
 4 assessment is based “on common scientific sense.” (Dr. Delgado Decl. ¶ 36, ECF No. 61-
 5 3.) *But see Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)
 6 (explaining that when peer review scrutiny is unavailable, experts should “explain
 7 precisely how they went about reaching their conclusions and point to some objective
 8 source—a learned treatise, the policy statement of a professional association, a published
 9 article in a reputable scientific journal or the like—to show that they have followed the
 10 scientific method, as it is practiced by (at least) a recognized minority of scientists in” the
 11 relevant field).

12 The Court assigns Dr. Delgado’s declaration minimal weight. Although he may
 13 have treated “people with infectious diseases including viral illnesses such as influenza
 14 which tend to occur in epidemics,” Dr. Delgado lacks significant experience in
 15 epidemiology. (Dr. Delgado Decl. ¶¶ 2–5.) Moreover, he does not explain the basis for
 16 his model used to assess the precise comparative risk of religious services and other
 17 activities—nor does he provide any supporting data for his conclusions. (*See id.* ¶¶ 25, 31,
 18 41 (broadly assigning values for “relative risk” factors like “touching objects” and being
 19 in “[c]lose contact with others” for various different environments without offering any
 20 data to support them); *see also* Imrey Decl. ¶¶ 31–40 (dissecting Dr. Delgado’s
 21 comparative risk model).) Therefore, although the Court has opted to not strictly apply the
 22 Rules of Evidence to the parties’ submissions, *see supra* note 7, the Court does not believe
 23 Dr. Delgado’s comparative risk assessment survives scrutiny under *Daubert*. *See* 509 U.S.
 24 579; *see also* Fed. R. Evid. 702 (providing expert testimony must be “based on sufficient
 25 facts or data” and be “the product of reliable principles and methods”).

26 And finally, aside from being unreliable, Dr. Delgado’s comparative risk assessment
 27 is simply not convincing in light of the evidence before the Court. The COVID-19
 28 pandemic remains an area “fraught with medical and scientific uncertainties.” *See S. Bay*

1 *Church*, 140 S. Ct. at 1613 (Roberts, C.J.). It is one thing for an expert to explain why
 2 epidemiologists believe there is a higher risk of transmission of SARS-CoV-2 in large
 3 gatherings, indoor spaces, and where groups are singing indoors, it is quite another for
 4 someone to purport to calculate—without data—that the risk of contracting COVID-19 at
 5 a house of worship is “12.5% the risk at the grocery store” or “1% the risk at public
 6 protests.” (See Dr. Watt Decl. ¶¶ 27–45; Dr. Delgado Decl. ¶¶ 25, 33, 43.) See also *supra*
 7 note 7. Probabilities are not derived from only “common scientific sense.” (See Dr.
 8 Delgado Decl. ¶ 36, ECF No. 61-3.) Hence, the Court assigns some weight to Dr.
 9 Delgado’s opinions about COVID-19, but the Court assigns no weight to the conclusions
 10 of his comparative risk assessment.

11 On balance, having reviewed the parties’ evidence, the Court finds Plaintiffs have
 12 not shown they are likely to succeed in demonstrating the State and County’s restrictions
 13 “infringe upon or restrict practices because of their religious motivation” or “in a selective
 14 manner impose burdens only on conduct motivated by religious belief.” See *S. Bay*
 15 *Church*, 959 F.3d at 939 (quoting *Lukumi*, 508 U.S. at 533, 543); see also *Harvest Rock*
 16 *Church*, 2020 WL 5835219, at *1–2. This determination does not mean Plaintiffs could
 17 not prevail at a trial on the merits. Rather, they merely have not shown they are entitled to
 18 the extraordinary remedy that is injunctive relief before trial. See *San Francisco*, 944 F.3d
 19 at 789 (providing the court should not issue a preliminary injunction “unless the movant, by
 20 a clear showing, carries the burden of persuasion”).

21 C. Discriminatory Enforcement

22 Last, the Court addresses Plaintiffs’ argument that California’s restrictions “have
 23 been enforced discriminatorily.” (Renewed Mot. 9:13–28; see also *id.* 20:16–23:9.)
 24 Plaintiffs argue that “despite enforcing its restrictions against houses of worship, California
 25 has steadfastly refused to enforce its restrictions against political protests,” making “places
 26 of worship” ultimately “pay for the sins of protestors . . . a palpable violation of Plaintiffs’
 27 rights.” (*Id.* 21:11–12, 23:8–9.) See also *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1083–
 28 84 (9th Cir. 2015) (analyzing a claim of whether Washington’s Pharmacy Quality

1 Assurance Commission selectively enforced rules concerning emergency contraceptives
 2 “against religiously motivated violations but not against secularly motivated violations” in
 3 contravention of the Free Exercise Clause).

4 The Court is unconvinced. Plaintiffs are challenging the State and County’s
 5 restrictions on indoor worship and group singing—not outdoor gatherings or protests. The
 6 operative restrictions do not limit attendance for outdoor religious services or outdoor
 7 protests. (See SAC Ex. 1-7; Grabarsky Decl. Ex. 14.) And the challenged restriction on
 8 group singing applies equally to indoor religious services and indoor protests. *See supra*
 9 Part II.E. Further, as described above, the distinction between indoor and outdoor
 10 gatherings is based on the State’s understanding of the increased risk of transmission of the
 11 novel coronavirus indoors. The same is true for the distinction between indoor and outdoor
 12 group singing. *See supra* Part II.A, E. Hence, the Court agrees that by focusing on outdoor
 13 protests, “Plaintiffs are comparing apples and oranges.” (State’s Opp’n 28:3–4.) Indeed,
 14 Judge Bernal rejected a similar argument in *Harvest Rock Church*. *See* 2020 WL 5265564,
 15 at *2 (reasoning that “how the Orders treat outdoor protests is irrelevant to whether the
 16 Orders’ restriction on indoor religious services is constitutional” and “whether the
 17 Governor encouraged outdoor protests that violated earlier stay-at-home orders is” likewise
 18 “irrelevant”).¹² The evidence in this case leads the Court to the same conclusion.

19 Moreover, the Court agrees that Plaintiffs do not otherwise demonstrate a pattern of
 20 discriminatory enforcement. On this point, the County shows that as of August 26, 2020,
 21 it “had issued 144 citations for violations of the County’s COVID-19 public health orders.”
 22 (Jordan Decl. ¶ 2, Ex. A, ECF No. 58-1.) None of those 144 citations was issued to places
 23 of worship or persons engaged in religious services. (*Id.* ¶ 3.)

24
 25 ¹² For this same reason, the Court finds distinguishable the district court’s discussion of protests
 26 in *Capital Hill Baptist Church v. Muriel Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126 (D.D.C.
 27 Oct. 9, 2020). (See ECF No. 70.) In that case, the District of Columbia contended it “has a compelling
 28 interest in capping the number of attendees at the Church’s *outdoor services*.” *Id.* at *8 (emphasis added).
 Here, by contrast, the State and County are not limiting the attendees at outdoor religious services, and
 the State’s restrictions are based on its understanding of the increased risk posed by large *indoor* gatherings
 that include group singing.

1 In addition, through August 26, 2020, the County had served ten cease-and-desist
2 orders or compliance letters to businesses and other entities with respect to reported
3 violations of the County’s public health orders. (Johnston Decl. ¶ 7, Ex. B, ECF No. 58-
4 2.) Only three of those items were issued to places of worship. (*Id.*) The remaining seven
5 were issued to businesses—including gyms and a restaurant with a bar—as well as a
6 college and a public school district. (*Id.*)

7 Finally, aside from issuing citations and cease-and-desist orders, the County has
8 issued health officer orders that require a business or other organization to immediately
9 close down and cease operations. (Jordan Decl. ¶ 9, Ex. C.) As of August 26, 2020, the
10 County had issued only five of these orders—none to places of worship. (*Id.*) Three of
11 the five immediate-closure orders were served on gyms that continued indoor operations
12 in violation of the applicable rules, and the other two were issued to restaurants with bars
13 for repeated violations of social distancing, sanitation, and facial covering requirements.
14 (*Id.*) The County submits that this evidence shows its “enforcement of COVID-19 public
15 health orders and regulations has been uniform, evenhanded, and in no way has treated
16 secular businesses or activities more favorably than religious organizations or services.”
17 (County’s Opp’n 10:11–16.)

18 In response, Plaintiffs claim the County “misses the point” because the County
19 “treats protestors as first-class citizens.” (Reply to County Opp’n 8:16–9:12.) The Court
20 disagrees. The manner in which the County is enforcing the State’s COVID-19 restrictions
21 goes to the heart of whether there has been discriminatory enforcement. The evidence does
22 not show a pattern of discriminatory enforcement against religious organizations. Nor does
23 the evidence show the County has treated comparable secular businesses or activities more
24 favorably than religious organizations. Therefore, Plaintiffs do not meet their burden on
25 this point. *See Stormans*, 794 F.3d at 1083–84 (concluding there was no evidence of
26 selective enforcement by the state commission against religiously motivated violations).

27 Overall, the Court finds that Plaintiffs have not shown they are likely to succeed on
28 their claim that the challenged restrictions are unconstitutional in light of discriminatory

1 enforcement. Hence, injunctive relief is similarly not appropriate on this basis. *See San*
2 *Francisco*, 944 F.3d at 789 (providing the court should not issue a preliminary injunction
3 “unless the movant, *by a clear showing*, carries the burden of persuasion”).

4 **V. CONCLUSION**

5 In sum, Plaintiffs have not demonstrated that new developments mean they are likely
6 to succeed on their free exercise claims under the federal and state constitutions. The
7 Court’s analysis of the remaining injunctive relief factors remains the same. (See Mot.
8 Hr’g Tr. 30:3–19.) Plaintiffs thus have not shown they are entitled to injunctive relief
9 before a trial on the merits. Consequently, the Court confirms its prior conclusions and
10 **DENIES** Plaintiffs’ renewed motion for a temporary restraining order or preliminary
11 injunction (ECF No. 53). For the same reasons, the Court also confirms that an injunction
12 pending appeal is not appropriate.

13 **IT IS SO ORDERED.**

14
15 **DATED: October 14, 2020**


Hon. Cynthia Bashant
United States District Judge