
In the Supreme Court of the United States

WENDY GISH, ET AL.,

Applicants,

v.

GAVIN NEWSOM, ET AL.,

Respondents.

**OPPOSITION TO EMERGENCY APPLICATION
FOR WRIT OF INJUNCTION**

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INTRODUCTION

Plaintiffs ask the Court to enjoin public health restrictions that California has adopted in response to the COVID-19 pandemic. But this is not an appropriate case for the Court to consider such relief. Plaintiffs filed their complaint in April 2020, contending that the State’s initial restrictions on worship services violated the First Amendment. After the State substantially altered its policies in response to evolving circumstances, the district court dismissed plaintiffs’ suit and invited them to amend their complaint to challenge the revised policies. Months passed, and plaintiffs failed to do so. Eventually, once plaintiffs confirmed they had no intent to challenge the State’s updated restrictions, the district court entered final judgment. Plaintiffs now seek to challenge California’s current policies in the first instance on appeal—in the absence of any record or reasoned opinion below addressing those policies.

That posture contrasts with two other pending cases challenging California’s current COVID policies. Following the Court’s recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), the Court remanded to the district court in *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (2020), for further consideration in light of that decision. The court of appeals issued a similar remand order in *South Bay United Pentecostal Church v. Newsom*, 981 F.3d 765 (9th Cir. 2020). After considering additional briefing and an expanded evidentiary record, the district courts in both cases issued reasoned decisions, applying *Roman*

Catholic Diocese to California's current policies and denying injunctive relief. Both cases are now pending before separate panels in the court of appeals, which are poised to rule in short order.

Although this case is not an appropriate vehicle for this Court to consider whether to enjoin California's current policies, plaintiffs have nonetheless asserted that those policies violate their rights to the free exercise of religion. *See, e.g.*, Application 5. That is a serious charge, invoking an important constitutional protection. While the State does not believe it is properly presented here, this response will present a comprehensive overview of the factual and legal considerations that demonstrate why the State's current public health restrictions comply with the Constitution and should not be subject to injunctive relief in any event.

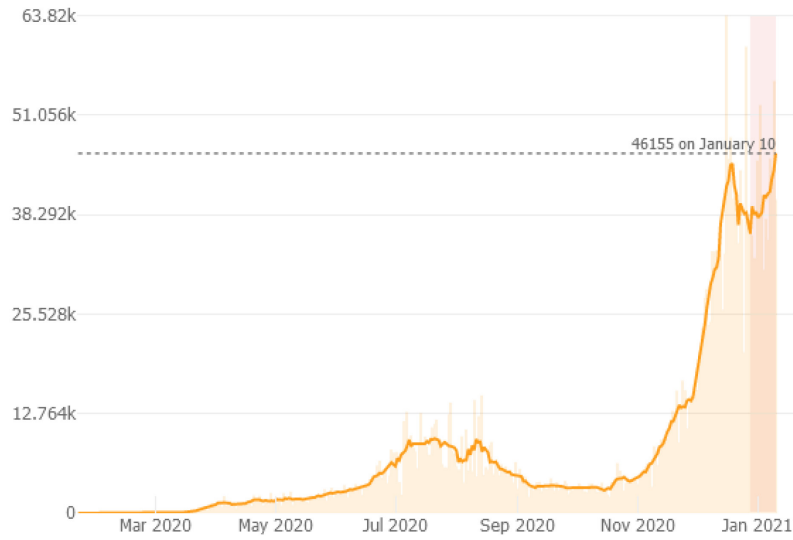
STATEMENT

A. Factual Background

Across much of the Nation, including California, the COVID-19 pandemic has entered its most dangerous stage. Infections, hospitalizations, and deaths are surging. Just six weeks ago, when this Court last considered California's response to the pandemic, about 1.2 million Californians had contracted the virus and more than 19,000 had died.¹ Today, those numbers are 2.7 million

¹ The Covid Tracking Project, *California: Cases*, <https://covidtracking.com/data/state/california/cases> (last visited Jan. 12, 2021); The Covid Tracking Project, *California: Outcomes*, <https://covidtracking.com/data/state/california/outcomes> (last visited Jan. 12,

infections and over 30,000 deaths.² It took 10 months for California to reach a million confirmed cases; the second million cases were recorded in just six weeks.³ And conditions continue to worsen, with some 39,000 new cases added each day of the last week:



*New Cases in California Per Day*⁴

COVID-19 is transmitted primarily by small respiratory droplets and aerosolized particles containing the virus that causes the disease. *See*

2021).

² State of California, *Tracking COVID-19 in California—Coronavirus COVID-19 Response*, <https://covid19.ca.gov/state-dashboard/> (last visited Jan. 12, 2021).

³ Money, *California Becomes the First State to Surpass 2 Million Coronavirus Cases*, L.A. Times, Dec. 24, 2020, <https://www.latimes.com/california/story/2020-12-23/covid-19-deaths-los-angeles-county-california>.

⁴ Johns Hopkins University, *Coronavirus Resource Center*, <https://coronavirus.jhu.edu/data/new-cases-50-states/california> (last visited Jan. 12, 2021).

Declaration of Dr. James Watt, M.D., M.P.H., D. Ct. Dkt. 81-3 ¶¶ 27-28 (Watt Decl.).⁵ Those droplets and particles are exhaled when individuals breathe, talk, sing, cough, or sneeze. *Id.* Although many people infected by the virus have no symptoms, asymptomatic individuals may still transmit the disease to others. *Id.* ¶¶ 30-32; Declaration of Dr. George Rutherford, M.D., D. Ct. Dkt. 81-4 ¶¶ 32-34 (Rutherford Decl.). Indeed, the “fact that [COVID-19] can be spread by individuals who are pre-symptomatic or asymptomatic is one of the aspects of the [virus] that makes it difficult to control.” Watt Decl. ¶ 32. “Individuals without symptoms are generally unaware they are infected and are thus less likely to be taking steps to avoid transmission of the virus.” *Id.*

The risk of transmission depends on several factors. First, the number of people involved in an activity matters: the more people who are gathered together, the greater the risk that one or more of them is infectious—particularly when community transmission levels are high—and the more people to whom the disease may be spread. Watt Decl. ¶¶ 42-43; Rutherford Decl. ¶¶ 90-91, 94; Declaration of Dr. Michael Stoto, Ph.D, D. Ct. Dkt. 81-5 ¶ 10 (Stoto Decl.).

Second, the nature of the activity matters. Epidemiologists have concluded that “[v]iral load”—the “number of viable viral particles” to which a

⁵ All citations to expert declarations are to the district court docket in *South Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865-BAS-AHG (S.D. Cal.). For the reasons explained below, *infra* pp. 18-22, the procedural irregularities of this case have prevented full development of the record.

person is exposed—determines whether the virus will “overcome [the] body’s defenses and cause” infection. Rutherford Decl. ¶¶ 36, 96. In other words, “[n]ot all exposures . . . will cause an infection; an infection will take place only where there is a sufficient dose of the virus to overcome the body’s defenses.” Watt Decl. ¶ 33. As a consequence, the risk of transmission increases when infected individuals engage in activity that increases the viral load when they exhale, such as “singing, chanting, shouting, and similar vocalization.” Rutherford Decl. ¶ 96.

Third, the location matters. The risk of transmission is higher indoors because there is “limited ventilation and no wind to dissipate respiratory particles into the atmosphere.” Watt Decl. ¶ 44; Rutherford Decl. ¶ 93. Indoor gatherings thus pose substantially greater risk compared to outdoor gatherings because of reduced airflow and smaller contained spaces, which allow droplets containing the virus to accumulate. *See* Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 90-93. The risk of transmission is reduced by wearing face coverings and by maintaining six feet of separation between individuals from different households, but such measures do not eliminate risk—they “are not a fool-proof intervention for stopping transmission.” Rutherford Decl. ¶ 75; *see also* Watt Decl. ¶¶ 38, 50-53, 70. This is especially true when individuals are in close proximity for extended periods of time, which increases the danger that the virus-laden droplets and particles exhaled by an infected individual will accumulate into a dose large enough to overcome the immune system of other

nearby participants and infect them. *See* Watt Decl. ¶ 43; Rutherford Decl. ¶¶ 90-91.

Indoor “congregate” activities, in which many people gather together in close proximity for extended periods of time, pose an especially great risk of transmission because of the combination of the number of people, the nature of the activity, and the location. *See* Watt Decl. ¶¶ 37-46; Rutherford Decl. ¶¶ 90-112; Brief of Amici Curiae Epidemiologists and Public Health Experts at 10-12, *Harvest Rock Church, Inc. v. Newsom*, No. 20A94 (Nov. 27, 2020). The risk is particularly high when congregate activities involve singing, loud speaking, or chanting, especially when they take place in buildings with limited ventilation. *See* Rutherford Decl. ¶¶ 95-100 (collecting scientific literature); *id.* ¶¶ 104-105. Experience bears this out: many indoor communal gatherings, including indoor worship services, have become “super-spreader” events, leading to hundreds or even thousands of infections. *See, e.g., id.* ¶¶ 100, 108-112 (collecting examples); Watt Decl. ¶ 46.

Recently, mutated variants of the COVID-19 virus appear to have increased the transmissibility of the virus by 40% to 70%.⁶ That mutation could lead to faster spread and far greater “hospitalizations and deaths.” *Id.*

⁶ *See* Healy, *New Evidence that U.K. Coronavirus Variant Spreads More Easily Has Scientists Really Worried*, L.A. Times, Jan. 10, 2021, <https://www.latimes.com/science/story/2021-01-10/new-evidence-that-u-k-coronavirus-variant-spreads-more-easily-has-scientists-really-worried>.

The new variant was detected in Southern California in late December, including in San Bernardino County, where some of plaintiffs' churches are located, *infra* p. 18.⁷

There remains no cure for COVID-19, *see* Watt Decl. ¶ 24, though scientists and public-health authorities have made substantial progress in developing and administering a vaccine. The federal government granted emergency-use authorization for two separate vaccines in December, and 9.3 million people have been vaccinated to date.⁸ It is predicted the general public will have access to the vaccines in “the late spring and early summer.”⁹ But until these vaccines are widely distributed, in order to effectively slow the spread of COVID-19, the types of gatherings and human interactions that allow for transmission of the virus must be limited. *See* Watt Decl. ¶¶ 24, 55.

⁷ *See* Wigglesworth, *New, Possibly More Contagious Coronavirus Strain Detected in Big Bear*, L.A. Times, Jan. 2, 2021, <https://www.latimes.com/california/story/2021-01-02/new-potentially-more-contagious-coronavirus-strain-big-bear>.

⁸ *See* U.S. Food and Drug Administration, *Pfizer-BioNTech COVID-19 Vaccine Emergency Use Authorization*, Dec. 13, 2020, *available at* <https://www.fda.gov/media/144412/download>; U.S. Food and Drug Administration, *ModernaTX Vaccine Emergency Use Authorization*, Dec. 18, 2020, *available at* <https://www.fda.gov/media/144636/download>; Keating, *Tracking the Coronavirus Vaccine, State By State*, Washington Post, Jan. 12, 2021, https://www.washingtonpost.com/graphics/2020/health/covid-vaccine-states-distribution-doses/?itid=sf_coronavirus_subnav.

⁹ *See* Johnson, *Your Questions About Coronavirus Vaccines, Answered*, Washington Post, Dec. 21, 2020, <https://www.washingtonpost.com/health/interactive/2020/covid-vaccines-what-you-need-to-know/>.

2. California and many other jurisdictions have adopted emergency measures to slow the spread of the virus. As the Chief of the Division of Communicable Disease Control for California's Department of Public Health has explained, the State's pandemic response "was designed to be, and has been, a work in progress that must be adjusted in real time based on new data and circumstances that arise during the course of the pandemic." Watt Decl. ¶ 59.¹⁰ From the earliest days of the pandemic, those policies have recognized the importance of religious activities and have preserved opportunities for religious worship.

a. *Early policies.* In March 2020, Governor Newsom proclaimed a state of emergency and then issued an executive order generally requiring individuals to stay at home except for those involved in certain federally recognized critical infrastructure sectors. App. 28-29. Days later, California's Public Health Officer designated additional critical infrastructure sectors, *see* App. 35-50, including "faith-based services that are provided through streaming or other technologies," *id.* at 47. The stay-at-home order proved effective and the rate of COVID-19 infection slowed, such that California hospitals were not "strained beyond capacity." Rutherford Decl. ¶ 53; *see also* Watt Decl. ¶ 54; Declaration of Dr. Yvonne Maldonado, M.D., D. Ct. Dkt. 81-6

¹⁰ *See also* Rutherford Decl. ¶ 52 ("the State has continuously fine-tuned its efforts to curb the spread of COVID-19 based on evolving science and data"); Stoto Decl. ¶ 32 (California "responded appropriately to both the changing epidemiological situation in California as well as emerging knowledge about the likely causes of disease spread and the efficacy of control strategies").

Ex. 1 ¶ 15 (citing a study estimating “that without the shelter-in-place orders in place at the outset of the pandemic, the viral spread would have been ten times greater”) (Maldonado Decl.).

The next month, the Governor announced a roadmap to guide reopening of the State. *See* App. 52-54; Watt Decl. ¶¶ 62-63. As part of that reopening, on May 25, the State allowed in-person worship services to resume statewide, but limited attendance to 100 persons or 25% of building capacity, whichever was lower. App. 58; Watt Decl. ¶¶ 66-70. Shortly thereafter, this Court denied an application for an emergency injunction against that restriction. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). In June, the State removed numerical limits on outdoor religious services, Watt Decl. ¶ 71, and issued a statewide order requiring face coverings in community settings. *See* Rutherford Decl. ¶ 71.

Unfortunately, the summer months saw a resurgence in COVID-19 infections and deaths. *See* Watt Decl. ¶ 72. In response, relying on emerging scientific evidence about the disease and how it spreads, the State tightened restrictions in July. *Id.* ¶¶ 73-81; App. 70-90. Among other things, the State discontinued indoor singing and chanting in schools, in restaurants, at protests, and during worship services, recognizing that such activities “negate the risk-reduction achieved through six feet of physical distancing,” App. 58.¹¹

¹¹ *See South Bay*, No. 20-CV-00865-BAS-AHG, D. Ct. Dkt. 47-1, Ex. 1-9, 1-10; D. Ct. Dkt. 57-1, Ex. 15-16.

Given the more limited risk of transmission outdoors, however, singing and chanting during outdoor worship services remained permissible, so long as congregants wore masks and physically distanced. *See id.* Later in July, the State closed indoor operations of restaurants, bars, movie theatres, zoos, and museums statewide, and closed indoor operations of certain other activities (including worship services, gyms, and hair salons) in counties with elevated infection levels. Watt Decl. ¶¶ 79-81; App. 81-90. Outdoor worship services continued to be allowed throughout the State without any attendance limits. *See App. 73.*

b. *The Blueprint.* In August, the State developed the “Blueprint for a Safer Economy,” a detailed plan for reopening the State based on the experiences of the first six months of the pandemic and the latest scientific evidence about how the virus is transmitted. *See App. 92-118, 125-155; Watt Decl. ¶¶ 82-88.* The Blueprint imposes restrictions on various sectors or activities based on the risk that they pose to public health, assessed in light of criteria such as the number of people, the nature of the activity, its duration, the ability to employ protective measures such as masks and physical distancing, and the degree of ventilation. App. 97-101, 113-118. For most sectors and activities, the stringency of the restrictions varies depending on the background public health conditions in each county. Counties are assigned to one of four tiers, ranging from Tier 1 (“Widespread”) to Tier 4 (“Minimal”), based on the county’s adjusted case rate and related objective criteria. *See id.*

The State re-evaluates each county’s tier status on a continual basis; as the objective indicators of local conditions change, the State moves counties into tiers with greater or lesser restrictions. App. 97-100; Watt Decl. ¶¶ 84-85.

Under this risk-based approach, in Tier 1 counties, the Blueprint prohibits indoor gatherings for certain businesses and activities—including museums, movie theaters, restaurants, and worship services—but allows such gatherings outside. App. 113-118. In other counties, the State allows these activities to operate indoors with capacity limitations: from the lesser of 25% capacity or 100 persons in Tier 2, to the lesser of 50% capacity or 200 persons in Tier 3, to 50% capacity in Tier 4. *See id.* Indoor protests and college lectures are separately subject to the same capacity restrictions and numerical caps as worship services.¹²

Other sectors and activities that pose less risk of transmission are subject to less-stringent restrictions. For example, personal care services, hair salons, hotels, and “limited services” (such as laundromats and auto repair shops), which do not typically involve large numbers of people in close proximity, are permitted to open in all risk tiers subject to certain restrictions.¹³ Other indoor

¹² *See* Cal. Dep’t of Public Health, *About COVID-19 Restrictions*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (drop down menu “Can I engage in political rallies and protest gatherings?”) (last visited Jan. 12, 2021); Cal. Dep’t of Public Health, *Industry Guidance to Reduce Risks*, <https://covid19.ca.gov/industry-guidance/> (drop down menu “Higher education—updated October 1”) (last visited Jan. 12, 2021).

¹³ *See* Cal. Dep’t of Public Health, *Industry Guidance to Reduce Risks*,

activities that involve large numbers of people but only short periods of close proximity, such as retail stores and shopping malls, are permitted to open indoors; but they are subject to capacity restrictions in Tiers 1 and 2. App. 113-118.¹⁴

Still other sectors and activities, such as gyms, wineries, bars, cardrooms, amusement parks, and offices, are subject to even more stringent restrictions. App. 113-118. Indoor concerts, plays, and other artistic performances, which are congregate activities similar to worship services, are entirely prohibited.¹⁵ Other gatherings not covered by specific guidance are permitted only outdoors in Tier 1, and are subject to a maximum of three households in all other tiers.¹⁶

<https://covid19.ca.gov/industry-guidance/> (drop down menu “Limited Services—updated October 20”) (last visited Jan. 12, 2021); Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Expanded Personal Care Services*, <https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf> (last visited Jan. 12, 2021).

¹⁴ See Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Shopping Malls, Destination Shopping Centers, and Swap Meets*, <https://files.covid19.ca.gov/pdf/guidance-shopping-centers--en.pdf> (last visited Jan. 12, 2021) (requiring common areas and food courts to be closed or subject to the restrictions for restaurants).

¹⁵ Cal. Dep’t of Public Health, *About COVID-19 Restrictions*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (drop down menu “Are gatherings for musical, theatrical, or artistic performances permitted?”) (last visited Jan. 12, 2021).

¹⁶ Cal. Dep’t of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020) <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx> (last visited Jan. 12, 2021).

c. *Present Surge and the Regional Stay at Home Order*. On December 3, 2020, in light of skyrocketing case rates and hospitalizations, *supra* pp. 2-3, the State tightened restrictions. App. 120-123. The Governor issued a Regional Stay at Home Order, dividing the State into five regions and imposing tighter restrictions when a region's ICU capacity falls below 15%. *Id.* At present, three of five regions—including the whole of Southern California—have dropped below 15%, meaning all counties in those regions are subject to the Regional Stay at Home Order.¹⁷

Under that Order, many activities permitted under Tier 1 of the Blueprint are prohibited: While outdoor worship remains allowed, the Regional Stay at Home Order forbids all outdoor dining, socializing with friends or family members from other households, and visits to zoos, museums, and outdoor movie screenings. App. 121, 125-156. The Order also closes personal-care businesses (including hair salons, nail salons, acupuncture, and massage services); prohibits any non-essential travel out of the region; and requires hotels not to honor out-of-state reservations for non-essential travel. *Id.* Finally, the Order reduces maximum grocery store capacity from 50% in Tier 1 of the Blueprint to 35%, and all other retail from 25% to 20% capacity.

¹⁷ See State of California, *Current Tier Assignments* (Jan. 12, 2021), <https://covid19.ca.gov/safer-economy/> (last visited Jan. 12, 2021). The Greater Sacramento region was previously subject to the Order, but public health officials recently lifted those restrictions on January 12, when projections showed that ICU capacity would rise above 15% in that region in four weeks. *Id.*

See id.; State of California, *Supplemental Regional Stay at Home Order* (Dec. 6, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/supplement-regional-stay-at-home-order.aspx>. In a case presenting a claim similar to the one plaintiffs raise here, a federal district court composed a table summarizing the Order's terms, which is reproduced below:

*Regional Stay at Home Order Restrictions*¹⁸

	Regional Stay at Home Order Capacity Restrictions
Places of worship	Outdoor only.
Political expression	Outdoor only.
Weddings and Funerals	Outdoor only.
Cultural ceremonies	Outdoor only.
Outdoor Recreational Facilities	Allow outdoor operation only without any food, drink or alcohol sales. Additionally, overnight stays at campgrounds will not be permitted.
Entertainment production and professional sports	No live audience.
Amusement parks	Closed.
Museums, zoos, and aquariums	Closed.
Restaurants	Take-out only.
Wineries	Closed for on-site consumption.
Bars, Breweries, Distilleries	Closed for on-site consumption.
Higher education	Outdoor only (closed for indoor lectures and student gatherings).
Convention Centers	Closed.
Concert venues	Closed.
Movies	Closed.
Family Entertainment Centers	Closed.
Musical, theatrical, and artistic performances	Closed.
Cardrooms and satellite wagering	Closed.
Tattoo shops	Closed.
Hair salons and barbershops	Closed.
Nail salons	Closed.
Body waxing studios	Closed.
Dance studios	Outdoor only.
Gyms	Outdoor only.
Indoor pools, hot tubs, saunas	Closed.
Hotels	Closed for in-state reservations unless used for listed exceptions. Open for non-essential, out-of-state reservations so long as reservation is at least the minimum time period required for quarantine.

¹⁸ *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974, at *5 (S.D. Cal. Dec. 21, 2020).

Music, film, and TV production	May resume subject to approval by county public health officers.
Public Transit	Open with safety precautions.
Office workspaces	Allow remote only except for critical infrastructure sectors where remote working is not possible.
Libraries	20% of capacity.
Retail stores / Shopping malls	20% of capacity.
Grocery stores	35% of capacity.
Laundromats	Open with modifications.
Critical infrastructure	Essential workers may work on site, if remote work not practicable.
Non-urgent medical and dental	Open with safety precautions.
Schools	Schools may not reopen fully for in-person instruction until the county has been in the Substantial (Red) Tier for two weeks. Local school and health officials may decide to open elementary schools, and school officials may decide to conduct in-person instruction for a limited set of students in small cohorts.
Child care	Open with safety precautions.
Day camps	Open with modifications.

While the Regional Stay at Home Order was initially designed to expire three weeks after being implemented in a region, the State extended the order in late December for two regions—Southern California and San Joaquin Valley—because ICU capacity remains at 0% in those regions.¹⁹ The State also recently extended the order for the Bay Area region because ICU capacity in that region remains dangerously low.²⁰ On January 12, public health officials lifted the Order in the Greater Sacramento region based on projected ICU

¹⁹ Money, *Stay at Home Order For Much of California Extended Amid Covid-19 Overload at Hospitals*, L.A. Times, Dec. 29, 2020, <https://www.latimes.com/california/story/2020-12-29/california-breaks-single-day-record-coronavirus-cases-66811>.

²⁰ See Kelliher, *State Extends Stay-At-Home Order in Bay Area as ICU Capacity Dwindles*, Mercury News, Jan. 9, 2021, <https://www.mercurynews.com/2021/01/09/state-extends-stay-at-home-order-in-bay-area-as-icu-capacity-dwindles/>.

capacity rising above 15% in four weeks—though present ICU capacity remains low at 9.4%. *Supra* n.17.

The strain on California’s hospitals has been devastating. “[E]mergency rooms are having to turn patients away, and the hospitals are being quickly overwhelmed.” *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974, at *12 (S.D. Cal. Dec. 21, 2020); see Watt Decl. ¶¶ 91, 93, 96-97. Some hospitals are running low on basic supplies, such as oxygen, for treating COVID patients.²¹ Non-COVID patients are also being denied care, as hospitals postpone surgeries and other treatments to make room for COVID patients.²² Ambulances have been directed to avoid transporting patients with “limited chance of survival”; other ambulances have had to wait as long as seventeen hours to offload patients into overflowing emergency rooms; gurneys have been set up in areas not intended for patient care, such as hospital lobbies

²¹ Karlamangla et al., *Darkest Days for L.A. Doctors, Nurses, EMTs: ‘The Way Most People Leave is by Dying,’* L.A. Times, Jan. 11, 2021, <https://www.latimes.com/california/story/2021-01-11/los-angeles-coronavirus-hospitals-ambulances-horror>; see also Money et al., *L.A. County Hospitals Running Dangerously Low on Oxygen, Supplies as ER Units Are Overwhelmed*, L.A. Times, Dec. 25, 2020, <https://www.latimes.com/california/story/2020-12-25/l-a-county-hospitals-running-dangerously-low-on-oxygen-supplies-as-er-units-are-overwhelmed>.

²² See, e.g., Karlamangla et al., *L.A. County Records 140 COVID-19 Deaths in One Day, a New Record*, L.A. Times, Dec. 24, 2020, <https://www.latimes.com/california/story/2020-12-24/coronavirus-surge-hammering-los-angeles-hospitals>.

and gift shops; and, once admitted, patients “line the hallways, unmonitored.”²³

Conditions are expected to deteriorate further in the coming weeks. Public health experts expect a “surge on top of a surge” following the recent holiday period, when many people traveled and gathered with members of other households.²⁴ Because hospitalization lags behind infection, the exponential increase in new infections over the past few weeks means that hospitals will soon be further stressed. *See* Watt Decl. ¶ 91; Maldonado Decl., Ex. 1 ¶ 25. In preparation, hospitals in Southern California have devised plans for rationing care, and California has activated its “mass fatality” program, securing dozens of additional refrigerated units to serve as excess morgue capacity and distributing 5,000 body bags.²⁵

²³ Karlamangla et al., *supra*, *Darkest Days for L.A. Doctors, Nurses, EMTs: ‘The Way Most People Leave is by Dying’*; see also Weber, *California Hospitals Discuss Rationing Care as Virus Surges*, Associated Press, Dec. 21, 2020, <https://apnews.com/article/us-news-los-angeles-health-coronavirus-pandemic-california711b71eea782c900efdc07156b76a5b9>; Arango, *Southern California’s Hospitals are Overwhelmed, and It May Get Worse*, N.Y. Times, Dec. 25, 2020, <https://www.nytimes.com/2020/12/25/us/southern-california-hospitals-covid.html?smtyp=cur&smid=tw-nytimes>.

²⁴ Lin et al, *COVID-19 Deaths Hit 11,000 In L.A. County, as Surge Creates ‘A Human Disaster,’* L.A. Times, Jan. 5, 2021, <https://www.latimes.com/california/story/2021-01-05/california-posts-single-day-record-coronavirus-cases-74000>.

²⁵ Lin et al., *L.A. County Outlines Wrenching Moves to Ration Healthcare if COVID-19 Hospital Crisis Worsens*, L.A. Times, Dec. 19, 2020, <https://www.latimes.com/california/story/2020-12-19/los-angeles-county-coronavirus-hospitalization-surge-rationing>; Booker, *California Activates ‘Mass Fatality’ Program as State Sets New Virus Records*, NPR News, Dec. 17,

B. Procedural History

1. a. The plaintiffs here are churches located in San Bernardino and Riverside Counties in Southern California. D. Ct. Dkt. 1 at ¶¶ 6-9 (Complaint filed April 13, 2020). Shortly after the Governor issued the State’s initial stay-at-home order in March 2020, *supra* p. 8, plaintiffs and several of their pastors filed a complaint alleging that the order (and related orders issued by county public health officials) violated the Free Exercise Clause by prohibiting “religious leaders from conducting in-person and out-of-home religious services.” *Id.* ¶ 34; *see also id.* ¶¶ 30-35, 93-103. Plaintiffs simultaneously sought a temporary restraining order (TRO), D. Ct. Dkt. 8, and the State filed its opposition three days later, D. Ct. Dkt. 13.

The district court denied the TRO motion on April 23, App. 5-13, rejecting plaintiffs’ contention that the March orders unconstitutionally burdened religion relative to “analogous secular conduct,” *id.* at 12. The court reasoned that an “in-person religious gathering” was “not analogous to” the secular activities plaintiffs identified as comparable, such as “picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete.” *Id.*

Plaintiffs appealed and moved for an injunction pending appeal. C.A. No. 20-55445, Dkt. 9. The court of appeals denied that motion in early May, *id.*,

2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/12/17/947522126/california-activates-mass-fatality-program-as-state-sets-new-virus-records>.

Dkt. 21, and the parties completed briefing on the underlying appeal in July. *Id.*, Dkt. 24, 30, 47. In addition to responding to the merits of plaintiffs' free-exercise claim, the State argued that the court of appeals lacked jurisdiction because it is well-established that there is no appellate jurisdiction to review denials of TROs, as opposed to preliminary injunctions. C.A. No. 20-55445, Dkt. 30 at 4. In the State's view, the TRO denial was not "tantamount to" the denial of preliminary injunctive relief because there was "no evidence presented at the hearing," which "was conducted on a highly expedited basis" with responsive briefs filed "only three days after" plaintiffs filed their application. *Id.*

b. Meanwhile, stabilizing "rates of new infections and hospitalizations" prompted several modifications to the State's public health restrictions. App. 52; *see supra* p. 9. In May, the State began allowing indoor worship services subject to certain capacity restrictions, *id.*; by mid-June, it had removed all numerical caps on outdoor worship, *id.*; *see* App. 23. In light of those developments, the State filed a motion in the district court to dismiss plaintiffs' challenge to the March orders because they "no longer constrain[ed]" plaintiffs from in-person worship. D. Ct. Dkt. 67 at 10. The State acknowledged, however, that plaintiffs should have the opportunity to amend their complaint to raise any challenges to the State's revised policies. *Id.* The district court agreed, dismissing the complaint with leave to amend "to allow

[p]laintiffs to bring claims based on the orders . . . that remain in effect.” App. 20.

Instead of filing an amended complaint, however, plaintiffs filed a motion for reconsideration with respect to the dismissal of their original complaint. *See* D. Ct. Dkt. 79-1, 84. The district court denied that motion for reconsideration, emphasizing that “nothing material has changed.” App. 25. “[T]he operative guidance in effect at the time of the Complaint,” the court reiterated, “is no longer in effect.” *Id.* The court again instructed plaintiffs that, if they wished to challenge the State’s revised restrictions, they would have every “opportunity” to do so, but that they first had “to amend” their complaint. *Id.*

Rather than doing so, plaintiffs informed the State that they would assent to entry of judgment. D. Ct. Dkt. 89-1 at 1 ¶¶ 3, 5. Consistent with that representation, the State asked the district court to dismiss the case with prejudice and enter final judgment. D. Ct. Dkt. 89. On December 11, the court did so. D. Ct. Dkt. 95.

c. Plaintiffs then filed a separate appeal from that judgment, C.A. No. 20-56324, Dkt 1, and the Ninth Circuit consolidated that appeal with the pending appeal of the April 23 denial of the TRO motion, *supra* p. 18.²⁶ On

²⁶ Oral argument had been set for that initial appeal in November, but the court of appeals postponed argument and held the case in abeyance when notified that the district court was likely to enter final judgment based on the plaintiffs’ failure to amend their complaint. *See* C.A. No. 20-55445, Dkt. 99.

December 18, plaintiffs filed an “emergency” motion for an injunction pending appeal with the court of appeals. C.A. No. 20-56324, Dkt. 2. Plaintiffs asked that court to enjoin “the enforcement of any orders curtailing” their “participation at in-person worship services,” *id.* at 2, 9, including the restrictions imposed by the Blueprint and Regional Stay at Home Order, *supra*, pp. 10-15. The State responded that the request was procedurally defective because plaintiffs had never sought such relief in district court: plaintiffs had “several opportunities in the district court to challenge the State’s operative restrictions and to seek injunctive relief,” the State explained, “but chose not to do so.” C.A. No. 20-56324, Dkt. 7-1 at 6-7. The court of appeals denied the motion for an injunction pending appeal on December 23, “without prejudice to renewing the request before the merits panel.” C.A. No. 20-56324, Dkt. 11.

The court of appeals then assigned the case to the same merits panel hearing the pending appeal in *South Bay United Pentecostal Church v. Newsom*, C.A. No. 20-56358. The court issued the same expedited briefing schedule in both cases. Under that accelerated schedule, briefing was completed on Monday, January 11, and oral argument is scheduled for Friday, January 15. C.A. No. 20-56324, Dkt. 12.²⁷

²⁷ The court of appeals also issued an order to show cause why the initial appeal challenging the district court’s TRO denial should not be dismissed. As the court of appeals explained, “review of the record suggests that [the initial] appeal . . . should be dismissed because the district court has now dismissed appellants’ claims and entered final judgment.” C.A. No. 20-55445, Dkt. 103 (Dec. 23, 2020). The court suggested that it would be “pointless for us to decide

d. On December 28, plaintiffs submitted an emergency application to this Court and served the State with a copy of that application. This Court did not docket that application. On December 30, plaintiffs filed a two-page motion for an injunction pending appeal in district court. D. Ct. Dkt. 100; *see id.* at 1 (explaining that motion was filed to satisfy Supreme Court Rule 23). That motion included no substantive arguments and asked the district court to “immediately enter [an] Order denying [p]laintiffs’ instant Application for Injunction Pending Appeal.” *Id.* at 2. On January 5, the district court denied the motion. App. 169.

Shortly thereafter, plaintiffs resubmitted their emergency application in this Court, which the Court then accepted for filing. Plaintiffs now request an injunction pending appeal prohibiting the enforcement of the Governor’s March and May 2020 executive orders, *see* Application 10 n.5, 25, which plaintiffs suggest will have the effect of rendering unenforceable all subsequent public health directives, including the Blueprint and Regional Stay at Home Order that are now in effect, *see id.* at 7 n.3; *see also id.* at i (challenging public health restrictions imposed “[i]n recent weeks”). According to plaintiffs, the State has violated the Free Exercise Clause by “singl[ing] out

what preliminary relief [plaintiffs] should have obtained on a claim when that claim has been dismissed and is before us on appeal.” *Id.* (quoting *SEC v. Mount Vernon Mem’l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982)) (internal alterations omitted). Plaintiffs have since agreed to dismiss the separate appeal of the TRO denial. C.A. No. 20-55445, Dkt. 117.

houses of worship for harsher restriction than that afforded secular activities,” *id.* at 8, such as “grocery stores, retail and other facilities,” *id.* at 11.

2. This Court has previously considered two other cases presenting challenges under the Free Exercise Clause to California’s pandemic-related restrictions on indoor worship. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (2020). In the wake of this Court’s decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam), both of those cases were remanded to the district court for further proceedings in light of that decision. In *Harvest Rock*, this Court ordered that remand. *See* 2020 WL 7061630 (2020). Shortly thereafter, the court of appeals ordered a similar remand in *South Bay*. *See* 981 F.3d 765 (9th Cir. 2020). The parties in both cases had the opportunity, during expedited remand proceedings, to submit additional evidence and briefing regarding *Roman Catholic Diocese*. In light of that evidence, including multiple declarations from experts in epidemiology and public health provided by the State, both district courts denied the plaintiffs’ renewed requests for injunctive relief.

The district courts concluded that California’s current restrictions are “painstakingly tailored to address the risks of Covid-19 transmission specifically.” *Harvest Rock*, 2020 WL 7639584, at *6 (C.D. Cal. Dec. 21, 2020); *see South Bay*, 2020 WL 7488974, at *8-12 (S.D. Cal. Dec. 21, 2020) (similar). “By contrast to . . . New York[,] California treats houses of worship like or more

favorably than similar secular institutions.” *Harvest Rock*, 2020 WL 7639584, at *5; *id.* at *4 (concluding that California’s policies are “neutral or generally applicable”). California prohibits activities that pose the greatest risk—such as indoor gatherings that “involve large groups of people coming together”—while restricting, without totally barring, activities that pose a comparatively smaller risk—such as visiting “retail shopping centers, hotels, laundromats, and liquor stores,” where people are unlikely “to remain in proximity for longer than a brief interlude.” *Id.* at *8-9; *South Bay*, 2020 WL 7488974, at *9-11 (similar).

The district courts also credited evidence showing that “lesser restriction[s]”—“for example, allowing indoor worship relying only on mask wearing, social distancing, and sanitization measures”—would not have “achieved California’s compelling interest in curbing the community spread of the virus.” *South Bay*, 2020 WL 7488974, at *12. Those measures “reduce[] the likelihood of transmission per interaction, whereas stay-at-home orders and capacity regulations reduce the number of interactions of people from different households.” *Id.*; *see Harvest Rock*, 2020 WL 7639584, at *8. The *South Bay* court also noted that “[i]f the dire trend of COVID-19 in Southern California—which has left the Region’s ICU capacity at 0%—proves anything, it is that the State’s efforts to implement curfews and less restrictive restrictions were not enough.” *South Bay*, 2020 WL 7488974, at *12. Without “doubt[ing] that not being able to congregate indoors imposes a burden on

[p]laintiffs’ religion,” the court emphasized that “the burden is a temporary one, with widespread vaccination in close sight.” *Id.* at *13.

For that reason, and because California’s current policies are “narrowly tailored to prevent the spread of COVID-19,” both courts determined that the State’s restrictions satisfy any applicable standard of scrutiny, including “strict scrutiny.” *Harvest Rock*, 2020 WL 7639584, at *7, *9; *see South Bay*, 2020 WL 7488974, at *11 (“California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed [its policies] to match its goal of reducing community spread.”).

The plaintiffs in both matters appealed and requested injunctions pending appeal. In *South Bay*, the court of appeals denied the request on December 24. *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7681858, at *1 (9th Cir. Dec. 24, 2020). As noted, the merits appeal in *South Bay* is proceeding on the same accelerated briefing schedule as the appeal in this case; both cases are scheduled for oral argument before the same panel on January 15. *See supra* p. 21.

In *Harvest Rock*, the parties completed briefing on December 31 on the motion for an injunction pending appeal, and the court heard oral argument on that motion on January 4. *Harvest Rock Church, Inc. v. Newsom*, C.A. No. 20-56357, Dkt. 13, 20. Shortly after that argument, the panel called for supplemental briefing. Dkt. 25. The parties filed their supplemental briefs on January 11, and the court is poised to issue a decision.

ARGUMENT

Plaintiffs seek an order from this Court enjoining California’s public health restrictions on indoor worship services. But the procedural posture of this case makes it inappropriate for the Court to consider such relief or to address the constitutionality of the State’s current policies here. Because plaintiffs never challenged those policies in district court—despite repeated opportunities to do so—the record contains no relevant evidence, and no court has issued a reasoned opinion in this case addressing the current policies.

In any event, as the fully developed evidentiary records and recent district court decisions in *Harvest Rock* and *South Bay* demonstrate, *supra* pp. 23-25, those policies do not violate the Free Exercise Clause. Plaintiffs and other people of faith undoubtedly have a powerful interest in worshipping in the place and manner of their choosing. The State recognizes that the current restrictions interfere with that interest, and the State is committed to relaxing those restrictions as soon as public health circumstances allow—as it has in the recent past. At present, however, that temporary interference is justified by the State’s interest in limiting the transmission of COVID-19 through tailored policies, based on medical and scientific evidence, that are proportional to the degree of risk posed by each regulated activity.

I. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT INAPPROPRIATE TO ISSUE THE INJUNCTIVE RELIEF SOUGHT BY PLAINTIFFS

A request for injunctive relief from this Court in the first instance “‘demands a significantly higher justification’ than a request for a stay, because

unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’” *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). The applicant must show that the “legal rights at issue” are “indisputably clear,” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), and that the Court is likely to grant certiorari and reverse, *see Shapiro et. al.*, Supreme Court Practice § 17.13(b), pp. 17-38 (11th ed. 2019). As with injunctive relief generally, the applicant must also show “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 v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam).

Plaintiffs cannot satisfy those standards. They were given every opportunity to raise their request for injunctive relief in district court, but they failed to do so. After denying plaintiffs’ request to enjoin California’s initial responses to the pandemic in April 2020, App. 5-13, the district court repeatedly instructed plaintiffs that they could update their claims and challenge the State’s revised policies—including California’s Blueprint, issued in August 2020—by amending their complaint and bringing a renewed motion for injunctive relief. *See supra* pp. 19-20. Plaintiffs never did so. Instead, they consented to entry of final judgment in district court; appealed from that judgment; and then moved for injunctive relief in the first instance before the

court of appeals. *Supra* pp. 19-21. The court of appeals properly denied that procedurally defective motion. *Supra* p. 21; *see, e.g.*, Fed. R. App. P. 8(a)(1) (“A party must ordinarily move first in the district court for . . . an order . . . granting an injunction.”).²⁸

Plaintiffs’ procedural choices make this an inappropriate case for the Court to consider issuing injunctive relief. In contrast to the fully developed records in *Harvest Rock* and *South Bay*, *supra* pp. 23-25, the record here was assembled over three days, at the beginning of the pandemic in early April, to defend the policies in existence at that time in response to a request for a TRO, *supra* pp. 18. And unlike *Harvest Rock* and *South Bay*, there is no reasoned decision in this case addressing the State’s current policies. This Court ordinarily prefers to consider important questions in cases with well-developed records and reasoned opinions; the Court has made that preference especially clear in the context of free-exercise challenges to state responses to the COVID-19 pandemic. *See, e.g., Harvest Rock*, No. 20A94, 2020 WL 7061630 (2020) (remanding to the district court to address *Roman Catholic Diocese* on a developed record in the first instance); *cf. Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017) (this Court is “a court of review, not of first view”).²⁹

²⁸ Plaintiffs’ subsequent, pro forma request for relief in the district court does not change the analysis. As noted, *supra* p. 22, plaintiffs urged the district court to “immediately . . . den[y]” their own motion, and plaintiffs have not since renewed their motion before the court of appeals.

²⁹ Unlike *Harvest Rock*, this case does not present an opportunity to construe

Plaintiffs suggest that the Court could enjoin enforcement of the State’s original executive orders responding to the pandemic, rather than its current policies. See Application 10 & n.5; *id.* at 25 (citing “Governor Newsom’s Executive Orders N-33-20 (March 19, 2020) and N-60-20 (May 4, 2020)”). But those orders were issued over eight months ago; it is too late to seek an injunction against them in this Court today. *Cf. Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) (“failure to act with greater dispatch tends to blunt [any] claim of urgency and counsels against the grant of” injunctive relief). And to the extent plaintiffs contend that enjoining those earlier orders would effectively block enforcement of all related “state health directives,” they are incorrect. Application 7 n.3. Even if plaintiffs obtained such relief, the State’s public health orders, including the Blueprint and Regional Stay at Home Order, *supra* pp. 10-15, would remain in effect.³⁰

the application as a petition for a writ of certiorari, grant it, and remand for further proceedings in light of *Roman Catholic Diocese*. The district court in this case did not enter final judgment until December 11, *supra* p. 20, after this Court had issued its decision in *Roman Catholic Diocese*. Plaintiffs thus could have moved for relief in district court in light of *Roman Catholic Diocese*, but did not. Compare Shapiro, *supra*, § 4.5, p. 4-21 & n.36 (noting that “GVR” orders “are not infrequent” where a decision below “predates . . . [an] intervening decision” of this Court) (emphasis added).

³⁰ Plaintiffs appear to believe that “all orders and directives” issued by the State to confront the pandemic “derive their authority” solely from the Governor’s March- and May-issued executive orders. Application 8. That is incorrect as a matter of state law. The State’s public health orders are independently authorized by the California Health and Safety Code, which, among other things, grants state health officials authority to “take measures as are necessary to” “prevent . . . spread” of “any contagious, infectious, or

Finally, plaintiffs’ application makes no attempt to show that this Court would likely grant certiorari and reverse the judgment below. *Supra* p. 27; *cf. Jackson v. District of Columbia Bd. of Elections*, 559 U.S. 1301, 1303 (2010) (Roberts, C.J., in chambers) (denying stay because “Court is unlikely to grant certiorari”). There was nothing improper about the district court’s decision to enter final judgment after plaintiffs failed to amend their complaint to advance an updated claim challenging the State’s revised public health restrictions. *See supra* pp. 19-20. Indeed, plaintiffs *consented* to entry of that judgment. *Supra* p. 20. Nor would there be any good reason for this Court to review the district court’s April 23 denial of plaintiffs’ TRO request. That decision concerned policies that are no longer in effect. And there would also be serious questions about this Court’s appellate jurisdiction to review that April ruling. *See Office of Pers. Mgmt. v. Am. Fed’n of Gov’t Employees, AFL-CIO*, 473 U.S. 1301, 1303-1304 (1985) (noting the “established rule . . . that denials of temporary restraining orders are ordinarily not appealable”); *supra* p. 19.

II. IN ANY EVENT, PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Because of plaintiffs’ failure to challenge the State’s current policies in district court, the State has not had occasion to develop a complete or up-to-

communicable disease.” Cal. Health & Safety Code § 120140; *see also* App. 28 (listing state law provisions authorizing public health orders); *640 Tenth, et al. v. Newsom*, No. 37-2020-00041316-CU-MC-CTL, slip op. at 21-22 (Cal. Super. Ct. Nov. 23, 2020) (concluding that Cal. Dep’t of Public Health maintains authority to take “necessary action” to prevent spread of virus).

date record in this case. In *Harvest Rock* and *South Bay*, by contrast, the State had that opportunity. *Supra* pp. 23-25. The records in those cases demonstrate why a free-exercise challenge to the current policies would fail in any event. *See Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers) (“legal rights at issue” must be “indisputably clear”); *supra* p. 27.

A. Plaintiffs Cannot Establish a Clear Right to Relief

1. The “protections of the Free Exercise Clause” apply if a law or policy “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); *see id.* at 533 (describing “requirement of neutrality”). Plaintiffs’ sole constitutional argument is that California has violated the Free Exercise Clause by treating “houses of worship with a harsher hand than secular businesses.” Application 24; *see also id.* at 17-18, 21-22.³¹ As the district courts in *Harvest Rock* and *South Bay* recognized, however, that is incorrect. *See Harvest Rock Church, Inc. v. Newsom*, 2020 WL 7639584, at *9 (C.D. Cal. Dec. 21, 2020); *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974, at *9 (S.D. Cal. Dec. 21, 2020).

The State’s restrictions on religious gatherings are the same or more permissive than restrictions on “other activities that similarly may involve

³¹ Plaintiffs make a brief reference to the “Free Speech” and “Freedom of Assembly Clauses,” Application i, but do not advance any arguments specific to those provisions.

gathering in groups for a prolonged period”—including restrictions on “weddings, funerals, college lectures,” “political [gatherings],” “[c]ardrooms” and other gambling venues, “concert[s],” “movie theatres, family entertainment centers, live performances,” and “live audience” participation in “professional sports.” *South Bay*, 2020 WL 7488974, at *9. Under California’s current restrictions, each of those activities is prohibited indoors in regions where ICU capacity has fallen below 15%. *Id.* at *4-5; *supra* pp. 13-15. Other indoor activities posing similarly high risks of transmission, such as dining in restaurants, exercising in gyms, or socializing in bars, are subject to the same or greater restrictions. *See South Bay*, 2020 WL 7488974, at *4-5. And religious services are permitted outdoors, even though many other outdoor activities—such as dining outside at restaurants, drinking outside at bars and wineries, overnight camping, visiting zoos or amusement parks, and socializing with friends or families from other households—are currently prohibited entirely. *See id.*; *Harvest Rock*, 2020 WL 7639584, at *6 (noting that members of multiple households may not gather outdoors “for a picnic, but they may gather outdoors to attend a religious service”).

The need for these restrictions is supported by abundant scientific evidence. After this Court remanded *Harvest Rock* for further consideration in light of *Roman Catholic Diocese*, the Ninth Circuit issued a similar order in *South Bay*, *supra* p. 23, and the Governor supplemented the record with additional evidence on the State’s current COVID restrictions and

justifications for those policies, including declarations from multiple experts with decades of experience in epidemiology and public health. *See, e.g.*, Declaration of Dr. James Watt, M.D., M.P.H., D. Ct. Dkt. 81-3 (Watt Decl.); Declaration of Dr. George Rutherford, M.D., D. Ct. Dkt. 81-4 (Rutherford Decl.).³² That evidence demonstrates that “the risk of transmission of the COVID-19 virus is higher” when “large numbers of people from different households” gather indoors for congregate activities, including in-person worship services. Watt Decl. ¶ 44; *see South Bay*, 2020 WL 7488974, at *3, 9-11 & nn. 3-10 (crediting this evidence); *Harvest Rock*, 2020 WL 7639584, at *6-9 (same).

As described in greater detail above, *supra* pp. 3-7, COVID-19 spreads primarily through respiratory droplets and aerosolized particles that are transmitted from one individual to another. Watt Decl. ¶¶ 27-28. The risk of transmission is greatly increased when large numbers of people from different households gather because “[t]he more people that gather, the higher the likelihood that an infected person will be present”—and “the larger the gathering, the higher the number of people who may be . . . infected by that already infected person.” *Id.* ¶ 42. Transmission risk is increased further when groups gather in close proximity for extended periods of time—especially

³² As in the Statement, *supra* p. 4 n.5, all citations to expert declarations are to the district court docket in *South Bay*, No. 20-CV-00865-BAS-AHG (S.D. Cal.). Substantially similar expert declarations appear in the *Harvest Rock* district court record.

when they engage in vocal activities that increase the volume of respiratory droplets and aerosolized particles containing the virus, which in turn increases the risk that participants will receive a sufficiently high dose to overcome their immune system and cause infection. *Id.* ¶¶ 43-45; Rutherford Decl. ¶¶ 90-91, 96. And the risk is increased even further when such gatherings take place indoors, where ventilation is limited and droplets containing the virus may accumulate. *See* Watt Decl. at ¶ 44; Rutherford Decl. at ¶¶ 91-92.

As leading epidemiologists confirmed in an amicus brief submitted to this Court, “activities that present the highest risk of COVID-19 transmission are thus those which occur indoors, in poorly ventilated spaces, where many people from different social ‘bubbles’ congregate in close proximity for an extended period.” Brief of Amici Curiae Epidemiologists and Public Health Experts at 13, *Harvest Rock Church, Inc. v. Newsom*, No. 20A94 (Nov. 27, 2020). “This includes indoor cultural events and performances, indoor demonstrations, and indoor religious worship services.” *Id.*; *see also* Watt Decl. ¶¶ 44-46; Rutherford Decl. ¶¶ 95-112; Declaration of Dr. Michael Stoto, PhD, D. Ct. Dkt. 81-5 ¶ 29 (Stoto Decl.).³³

The scientific evidence also shows that the indoor activities that are subject to less stringent restrictions than worship services—such as shopping

³³ *See also* *South Bay United Pentecostal Church v. Newsom*, 2020 WL 6081733, at *3 (S.D. Cal. Oct. 15, 2020) (“[A]ttending indoor worship services (and similar cultural events . . .) presents an exceptionally high risk of COVID-19 transmission because [such events] involve a combination of many high risk factors.”).

in “[g]rocery stores and retail shops” and other non-comparable activities discussed below—pose a lower risk of transmission because they typically involve brief encounters between individuals rather than gatherings of large numbers of people in close proximity for an extended duration of time. *South Bay*, 2020 WL 7488974, at *10; see Rutherford Decl. ¶¶ 113-133. Such fleeting encounters are unlikely to transmit the virus because uninfected individuals “are less likely to receive a sufficient viral load of droplets or aerosolized particles sufficient to overcome their defenses and cause a COVID 19 infection.” Rutherford Decl. ¶ 113; see also Watt Decl. ¶ 86; *id.* ¶¶ 103-108. Both “the proximity of a non-infected person to an infected person” and “the length of time they spend in proximity” affect the dose that the uninfected person will receive. Brief of Amici Curiae Epidemiologists and Public Health Experts, *supra*, at 8; see also Watt Decl. ¶ 43.

Plaintiffs have not identified any evidence that rebuts this scientific understanding. Indeed, as discussed above, *supra* pp. 21, 28, plaintiffs have not submitted any pertinent evidence in this case. And while the judicial branch should not blindly defer to the expert judgments of local officials, courts “must afford substantial deference to state and local authorities” regarding their scientific assessments and judgments about how “to impose tailored restrictions” that “balance competing policy considerations during the pandemic.” *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh J., concurring).

2. a. Plaintiffs contend that the State’s risk-based justifications cannot be reconciled with *Roman Catholic Diocese* and that the Court should enjoin California’s current public health measures on that basis. *See, e.g.*, Application 23. But this Court considered a request to enjoin California’s restrictions just days after it issued *Roman Catholic Diocese*. And instead of granting injunctive relief, the Court remanded to the district court for further examination of the particular features of California’s policies under the standards set out in *Roman Catholic Diocese*. *See Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (2020). After carefully reviewing those policies and all of the evidence submitted in support of them, the district court in that case concluded that the policies do not “single out” “houses of worship for especially harsh treatment” like the policies that troubled this Court in *Roman Catholic Diocese*, 141 S. Ct. at 66. *See Harvest Rock*, 2020 WL 7639584, at *5 (“By contrast to . . . New York,” “California treats houses of worship like or more favorably than similar secular institutions.”); *see also South Bay*, 2020 WL 7488974, at *9 (similar).

Plaintiffs nonetheless assert that California’s “restrictions on churches are plainly greater than those imposed on other industries” and that the State “has failed to provide *any evidence*” that indoor worship services “pose[] a greater threat to public health” than these other activities. Application 18, 21. Plaintiffs reference, among other activities, “obtaining a haircut, shopping, getting a car repaired, attending a farmer’s market, or browsing stacks at a

local library.” *Id.* at 1. This Court expressed similar concerns in *Roman Catholic Diocese*, concluding that New York had not provided sufficient evidence to justify vastly disparate treatment of businesses such as “camp grounds” and “large store[s]”, 141 S. Ct. at 66, 67; “hardware stores, acupuncturists, and liquor stores,” *id.* at 69 (Gorsuch, J., concurring); or “grocery store[s]” and “pet store[s],” *id.* at 70 (Kavanaugh J., concurring).

As discussed above, however, the records in *Harvest Rock* and *South Bay* show that California’s policies are “painstakingly tailored to address the risks of Covid-19 transmission.” *Harvest Rock*, 2020 WL 7639584, at *6. The State’s epidemiological experts examined each of the sectors referenced by plaintiffs and offered persuasive public health reasons for their differential treatment.³⁴ The experts specifically described how the risk of transmission “increases commensurately with the size of the group”; with the nature of the activity (including the extent to which members of the group are in close proximity to one another and remain “in close proximity for an extended period”); and with the location of the activity. Watt Decl. ¶¶ 38, 39, 43; *see id.* ¶¶ 44-46; Rutherford Decl. ¶¶ 37-38, ¶¶ 90-110; Stoto Decl. ¶¶ 29-32. Those considerations explain why the State has adopted less stringent capacity limits on some of the activities referenced by plaintiffs, all of which pose lesser risks of COVID-19 spread than gathering in large groups indoors for an extended

³⁴ *See, e.g.*, Watt Decl. ¶¶ 98-108; Rutherford Decl. ¶¶ 113-133; Stoto Decl. ¶¶ 22, 29-32; *infra* pp. 38-42.

period of time. See *South Bay*, 2020 WL 7488974, at *8-11; *Harvest Rock*, 2020 WL 7639584, at *5-9.

For example, “shopping at a grocery or big box store ‘involves less risk’ of Covid-19 transmission than attending an indoor worship service.” *Harvest Rock*, 2020 WL 7639584, at *8. “[I]nteractions between patrons in these places are typically asocial, distanced, and *short in time*—with patrons generally seeking to leave the store as soon as possible.” *South Bay*, 2020 WL 7488974, at *10 (emphasis added). That means shoppers are unlikely to “receive a sufficient viral load of droplets or aerosolized particles . . . to overcome their defenses and cause a COVID 19 infection.” *Harvest Rock*, 2020 WL 7639584, at *8; see Rutherford Decl. ¶¶ 114-119.

Even so, California has imposed significant restrictions on shopping, which are commensurate with the risk it poses. All retail stores—including grocery stores, big-box stores, and liquor stores—are subject to indoor capacity limitations. *Supra* pp. 12, 13-15. In particular, in regions with an ICU capacity below 15%, including the Southern California region where plaintiffs’ churches are located, grocery stores may not exceed 35% capacity while shopping malls and other retailers may not exceed 20% capacity. *Supra* pp. 13, 15. This case is thus significantly different from *Roman Catholic Diocese*, where the Court noted that comparable categories of businesses were free to “admit as many people as they wish.” 141 S. Ct. at 66; see *id.* at 69 (Gorsuch,

J., concurring) (emphasizing that New York “impose[d] *no* capacity restrictions” on many comparable activities).³⁵

Plaintiffs also refer to personal care services, such as “obtaining a haircut” and visiting a “nail salon.” Application 1, 21. But those activities are now barred in regions with an ICU capacity below 15%, including the region where plaintiffs’ churches are located. *South Bay*, 2020 WL 7488974, at *4-5, *11. The State has ordered “acupuncture facilities,” tattoo parlors, spas, body waxing studios, and providers of other similar services to shut down as well. *Roman Catholic Diocese*, 141 S. Ct. at 66; *see supra* p. 13. Even if that were not the case, however, those activities would not be comparable to indoor

³⁵ In comparing retail-store capacity limitations with capacity limits for churches under Tiers 2-4 of the Blueprint, *see, e.g.*, Application 22, plaintiffs compare apples with oranges. Under California law, the ordinary capacity of a building depends on the nature of the activity that takes place there. A 10,000 square-foot church, theater, or lecture hall, for example, is expected to have a significantly greater capacity than a 10,000 square-foot retail store because the church, theater, and lecture hall allot far less square footage to each occupant than allotted to an occupant in a retail store. (In other words, capacity limitations contemplate that people can be packed in more tightly when they attend an assembly than when they shop at a store). More substantial deviations from ordinary capacity limits are thus necessary when it comes to churches, theaters, and similar buildings to ensure the type of low-density occupancy that allows for physical distancing. *See* Cal. Fire Code, pt. 3, ch. 10, table 1004.5 (“maximum floor area allowance[.]” of 60 square feet of space per occupant in “mercantile”-use spaces); *id.* (seven square-feet per occupant for assembly-use spaces); *see, e.g.*, Santa Clara County, *COVID-19 Capacity Limitations*, <https://www.sccgov.org/sites/covid19/pages/covid-capacity.aspx> (last visited Jan. 12, 2021); U.S. Fire Admin., *Understanding the Impact of Social Distancing on Occupancy*, https://www.usfa.fema.gov/coronavirus/planning_response/occupancy_social_distancing.html (“in order to operate while practicing social distancing, an office building might need to reduce the number of people inside by about 11% whereas a bar might need to reduce its number by as much as 95%”) (last visited Jan. 12, 2021).

congregate activities because they all involve one-on-one encounters, which can be safely conducted with secondary barriers such as plastic shields and other precautions imposed in relevant industry guidance. They are thus far less likely to involve infected individuals—or to spread the virus from a single infected person to numerous other people. *See* Watt Decl. ¶ 38 (“risk increases commensurately with the size of the group”); Rutherford Decl. ¶ 120 (similar).

Nor do “manufacturing [and] warehousing” facilities (Application 22) present the same risks as indoor worship services. They do not typically “involve people in close proximity to others for extended periods of time. *Harvest Rock*, 2020 WL 7639584, at *9. Where they do, employers are required to “screen workers,” “develop safety plans,” or install “plexiglass barriers” (or other similar partitions) to protect workers. *South Bay*, 2020 WL 7488974, at *10; *see* Rutherford Decl. ¶ 121.³⁶ And unlike indoor worship settings, these workspaces are “closed systems in which employers can determine who is allowed ‘in the bubble.’” *Harvest Rock*, 2020 WL 7639584, at *9. “Work shifts may be grouped to control personnel to whom the employees are regularly exposed, thus diluting the risk presented by likelihood of strangers from

³⁶ *See also* Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Manufacturing* (July 29, 2020), <https://files.covid19.ca.gov/pdf/guidance-manufacturing--en.pdf> (last visited Jan. 12, 2021); Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Logistics and Warehousing* 8 (July 29, 2020), <https://files.covid19.ca.gov/pdf/guidance-logistics-warehousing--en.pdf> (last visited Jan. 12, 2021).

different bubbles randomly mixing at each gathering.” *South Bay*, 2020 WL 7488974, at *10.

Employers are also “better positioned to control [their] employees’ behavior,” and are subject to a host of “health and safety requirements enforced by State labor authorities,” *id.*—including requirements to report exposure incidents and to track when workers are present and for how long.³⁷ These stringent regulations are appropriate for workplace settings, facilitating “contact tracing” and allowing employers to identify and contain an exposure before numerous workers become infected. But the State does not—and indeed, likely could not—regulate religious services in the same way.³⁸

³⁷ See, e.g., Cal. Labor Code § 226(a) (requiring employers to track a specific worker’s “total hours worked”); 8 Cal. Code Regs. § 340 (requiring employers to notify workers of their right to report dangerous conditions and request inspection by state authorities); Cal. Dep’t of Public Health, *AB 685 COVID-19 Workplace Outbreak Reporting Requirements* (Dec. 10, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/ab685.aspx> (last visited Jan. 12, 2021) (employers must notify employees who may have been exposed to COVID-19); Cal. Dep’t of Public Health, *COVID-19 Employer Playbook: Supporting a Safer Environment for Workers and Customers* 9 (Sept. 25, 2020), <https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf> (last visited Jan. 12, 2021) (“employers are required to report outbreaks to the [local health department] in the jurisdiction where the workplace is located and the [local health departments] of residence of employees with COVID-19”); see also *id.* at 20-21 (discussing other reporting requirements).

³⁸ Plaintiffs also mention “librar[ies],” “gas stations,” “marijuana dispensaries,” “pharmacies,” and “childcare,” suggesting without citation that some of these activities are permitted “to operate . . . fully.” Application 1, 11. That is incorrect. Libraries are subject to the same 20% capacity restriction that applies to retail stores. *Supra* p. 15. That retail restriction likewise applies to gas station convenience stores, marijuana dispensaries, and

Finally, California treats “camp grounds” and “schools,” *Roman Catholic Diocese*, 141 S. Ct. at 66-67, very differently from how New York did. As noted, campgrounds are currently closed under the State’s Regional Stay at Home Order. *Supra* p. 14. In any event, they pose a far lower risk of spreading COVID than large indoor gatherings because camping is an outdoor activity. *See* Watt Decl. ¶ 107. And most California schools are closed for in-person classes. While “[l]ocal school and health officials may decide to open elementary schools,” *South Bay*, 2020 WL 7488974, at *5 n.29, those schools “are required to have small, stable groupings” to reduce mixing and lower transmission risk. Rutherford Decl. ¶ 129; *see supra* n.38 (discussing childcare restrictions that apply to elementary schools). In addition, epidemiological evidence shows that the young children who attend elementary schools pose a significantly “lower transmission risk” than adults do. *Id.*³⁹

pharmacies. *See* Cal. Dep’t of Public Health, *Industry Guidance, Retail—Updated October 20* (Dec. 24, 2020), <https://covid19.ca.gov/industry-guidance/> (classifying facilities specializing in medical goods and supplies, pharmacies, and gas stations as retail) (last visited Jan. 12, 2021). And childcare is subject to numerous restrictions, including rules strictly limiting “cohorts” of children and participating adults. *See, e.g.*, Cal. Dep’t of Public Health, *Guidance Related to Cohorts* (Sept. 4, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/small-groups-child-youth.aspx> (last visited Jan. 12, 2021).

³⁹ *See* Parshley, *Kids Catch and Spread Coronavirus Half As Much As Adults*, National Geographic, Dec. 10, 2020, <https://www.nationalgeographic.com/science/2020/12/we-now-know-how-much-children-spread-coronavirus/> (collecting scientific studies showing that children under age 12 are less likely to get sick and “transmit the virus to others”); *see, e.g.*, Sun et al., *Transmission Heterogeneities, Kinetics, and Controllability of SARS-CoV-2*, *Science*, <https://science.sciencemag.org/content/early/2020/11/23/science.abe2424>.

b. Plaintiffs further contend that California could adopt “other less restrictive rules . . . to minimize the risk to those attending religious services.” Application 21 (quoting *Roman Catholic Diocese*, 141 S. Ct. at 67). For example, they point to “capacity limitations; mask-wearing requirements; and sanitation protocols.” *Id.* But the records in *Harvest Rock* and *South Bay* provide ample support for California’s determination that those less-restrictive measures would be inadequate to prevent the spread of COVID-19.

The State’s epidemiological experts concluded that those precautions did not sufficiently mitigate the risks posed by indoor worship services and other comparable indoor activities. They explained that “keeping six feet of separation between individuals and wearing face coverings can reduce the risk of disease transmission,” but that “any gathering increases the risk of individual and community transmissions.” Watt Decl. ¶ 38. And that risk is increased even further where individuals are in close proximity for extended periods of time in an indoor location with limited ventilation, as in an indoor worship service—especially in regions where infection rates are high and especially when people engage in vocal activities like talking or singing. *Id.* ¶¶ 39-45, 60; see Rutherford Decl. ¶ 75 (“[f]ace coverings . . . are not a fool-proof intervention for stopping transmission”); Stoto Decl. ¶¶ 10, 37 (similar).⁴⁰

⁴⁰ See also Centers for Disease Control and Prevention, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, <https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html> (discussing evidence that cloth masks can block only approximately

After reviewing that evidence, the district courts in *Harvest Rock* and *South Bay* found that “[m]ask wearing, social distancing, and sanitization” would not, on their own, be sufficient to address the risk posed by large indoor gatherings when community transmission is high. *South Bay*, 2020 WL 7488974, at *12; see *Harvest Rock*, 2020 WL 7639584, at *8.

California’s experience confirms the inadequacy of alternative, less restrictive measures. Shutdown orders like those instituted by the State early in the pandemic “substantially slow[ed] the spread of COVID-19.” Declaration of Yvonne Maldonado, D. Ct. Dkt. 81-6, Ex. 1 ¶ 16; see also Stoto Decl. ¶¶ 13-15, 19 (“empirical evidence shows that the Shelter-in-Place (SIP) orders have been effective.”). When case and hospitalization rates slowed in the early summer, California loosened its initial restrictions and “tried . . . [allowing] indoor worship at 25%” of the “church’s maximum capacity.” *South Bay*, 2020 WL 7488974, at *12. But that “restriction proved insufficient to prevent outbreaks at houses of worship” across the State, including in “the Southern California Region” where plaintiffs’ churches are located. *Id.*; see *infra* p. 46

“50-70%” of “fine droplets and particles”) (last visited Jan. 12, 2021); Xi et al., *Effects of Mask-Wearing on the Inhabitability and Deposition of Airborne SARS-CoV-2 Aerosols in Human Upper Airway*, 32 *Physics of Fluids* 123312 (2020), available at <https://aip.scitation.org/doi/10.1063/5.0034580> (similar); Brief of Amici Curiae Epidemiologists and Public Health Experts, *supra*, at 14 (although wearing a mask or face covering while singing decreases the risk of transmission, “when infected persons sang, they produced a number of droplet particles comparable to those produced through ordinary speech *without a mask*”).

n.43 (collecting examples). “If the dire trend of COVID-19 in Southern California—which has left the Region’s ICU capacity at 0%—proves anything, it is that the State’s efforts to implement . . . less restrictive restrictions were not enough.” *South Bay*, 2020 WL 7488974, at *12.⁴¹

c. Other considerations that led this Court to conclude that the restrictions challenged in *Roman Catholic Diocese* were likely unconstitutional are absent here. There is no evidence that the State has “specifically targeted” any religious communities or “gerrymandered” its public health restrictions to ensure certain communities would be included. *Roman Catholic Diocese*, 141 S. Ct. at 66.⁴² And unlike New York, California has made clear since the early days of the pandemic that “faith based services” are a “critical infrastructure sector[]” and that workers providing faith-based services are an “essential workforce.” App. 48; compare *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) (the “only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces”).

⁴¹ See also Enos, *Dozens of Covid-19 Cases Linked to Christmas Eve Gatherings at Woburn Church*, Boston Globe, Jan. 2, 2021, <https://www.bostonglobe.com/2021/01/02/metro/dozens-covid-19-cases-linked-christmas-eve-gatherings-woburn-church/> (outbreak from services linked to 44 cases, despite reduced capacity limitations, masking requirements, social distancing and strict hygiene controls).

⁴² *South Bay*, 2020 WL 7488974, at *7 (“The Court finds no evidence . . . that can be viewed as targeting [p]laintiffs’ faith or singling out any other religion.”).

Finally, while the Court in *Roman Catholic Diocese* focused on evidence that the churches at issue in that case rigorously adhered to safety protocols and had not experienced any outbreaks, *see* 141 S. Ct. at 67, plaintiffs here presented no such evidence, and the record in *Harvest Rock* and *South Bay* show that some churches in California have not “implemented and adhered to all health protocols” and have suffered “outbreak[s] of COVID-19 in [their] congregations,” *id.* Harvest Rock’s Pasadena church, for example, “is not operating in compliance with” state and local policies regarding “indoor services and the wearing of protective masks along with the requirement of social distancing.” App. H to Application for Injunctive Relief, No. 20A94 (August 13, 2020 letter from Pasadena Office of the City Attorney to Harvest Rock Church). And the *South Bay* district court record identifies multiple instances where indoor worship services in California have led to super-spreader events.⁴³

B. Equitable Considerations Also Weigh Against Injunctive Relief

As this Court recently recognized, any challenged restriction that limits the ability to worship “will cause irreparable harm” to some degree. *Roman Catholic Diocese*, 141 S. Ct. at 67. The State has endeavored to address the

⁴³ *See, e.g.*, D. Ct. Dkt. 81-1 at Ex. 23 (71 infections linked to a single Sacramento service in March); *id.* 57-1 at Exs. 23-27 (multiple outbreaks tied to indoor services in May); *id.* 81-1 at Exs. 17-20 (outbreak at church in San Diego in November), Exs. 21-23 (outbreak at church in Los Angeles in late October); *see also* Rutherford Decl. ¶¶ 108-110 (listing incidents involving coronavirus transmission at houses of worship); Watt Decl. ¶ 46 (same).

grave public health challenges of this moment while also accommodating the important interests of its residents in participating in religious services. At present, in regions where ICU capacity has fallen below 15% or in Tier 1 counties, indoor services are temporarily prohibited because of exigent public health circumstances, but worship services are permitted outdoors (and through streaming video or other remote technology) without numerical restriction. *Supra* pp. 11, 13. Of course, these are imperfect substitutes. *See, e.g., Roman Catholic Diocese*, 141 S. Ct. at 68 (“such remote viewing is not the same as personal attendance”). But these policies reflect the State’s recognition of the great value of religious freedom and free exercise to our society—and the State’s commitment to allowing indoor, in-person worship to resume when the public health circumstances allow it.⁴⁴

Apart from the injury that is inherent in any restriction on attending indoor worship services, plaintiffs have not substantiated any other harm flowing from the challenged policies. They contend that the challenged restrictions harm them by “singl[ing] out [plaintiffs]’ exercise of faith for harsher treatment than” secular activities. *E.g.*, Application 13. As explained

⁴⁴ Churches throughout the State have been holding outdoor services during the pandemic. *See, e.g., Coronado, Christmas Mass Celebrated Outdoors Because of Pandemic*, NBC San Diego, Dec. 24, 2020, <https://www.nbcsandiego.com/news/coronavirus/christmas-mass-celebrated-outdoors-due-to-pandemic/2480318/>. California has no attendance cap on outdoor services. And the temperate climates in the Southern California counties where plaintiffs’ churches are located (*see* Application ii) make outdoor services an option even during the winter months.

above, however, the restrictions on indoor worship activities are the same as—or more permissive than—those imposed on comparable secular gatherings that occur indoors and pose an equivalent threat to public health. And science and epidemiology offer compelling reasons for imposing different restrictions on sectors and activities that pose materially different levels of risk.

Moreover, the equitable inquiry also considers “the balance of equities” and “the overall public interest.” *Winter*, 555 U.S. at 26. States and local governments have the right and responsibility to protect residents against deadly communicable diseases and guard against overwhelming their hospitals. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944); *Roman Catholic Diocese*, 141 S. Ct. at 67. The restrictions challenged here impose temporary restrictions on indoor gatherings “to address this extraordinary health emergency,” *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), by diminishing the serious risk of widespread transmission of the COVID-19 virus that would occur if those gatherings were not regulated, *see* Watt Decl. ¶ 83. Responding to the pandemic remains “a dynamic and fact-intensive matter.” *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Consistent with the State’s science-based approach to combatting the coronavirus, it will re-assess the COVID-19 transmission risk across the State on a continual basis and will relax or remove restrictions when considerations of safety and public health allow. But in light of the continued uncertainty surrounding this deadly virus, the skyrocketing case counts and

hospitalizations, and the lack of any cure or widely distributed vaccine, that moment has not yet arrived.

CONCLUSION

The Court should deny the application.

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