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17 UNITED STATES DISTRICT COURT
18 SOUTHERN DISTRICT OF CALIFORNIA

19 SOUTH BAY UNITED
20 PENTECOSTAL CHURCH, a California
21 non-profit corporation, and BISHOP
22 ARTHUR HODGES III, an individual,
23 Plaintiffs,
24 v.
25 GAVIN NEWSOM, in his official capacity
26 as the Governor of California, *et al.*,
27 Defendants.

Case No.: 3:20-cv-00865-AJB-MDD

**Notice of Application and
Application for a Temporary
Restraining Order, and Order to
Show Cause re: Preliminary
Injunction**

Judge: Anthony J. Battaglia
Courtroom: 4A

Oral Argument Requested

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

3 PLEASE TAKE NOTICE that Plaintiffs South Bay United Pentecostal
4 Church and Bishop Arthur Hodges III, by and through counsel, will and hereby do
5 apply to this Court pursuant to Fed. R. Civ. P. 65(b) for a temporary restraining order
6 against Defendants Gavin Newsom, in his official capacity as the Governor of
7 California; Xavier Becerra, in his official capacity as the Attorney General of
8 California, Sonia Angell, in her official capacity as California Public Health Officer,
9 Wilma J. Wooten, in her official capacity as Public Health Officer, County of San
10 Diego, Helen Robbins-Meyer, in her official capacity as Director of Emergency
11 Services, and William D. Gore, in his official capacity as Sheriff of the County of San
12 Diego (“Defendants”), and for the issuance of an order to show cause why a
13 preliminary injunction should not issue, as follows:

14 1. Defendants, their agents, employees, and successors in office, are
15 restrained and enjoined from enforcing, trying to enforce, threatening to enforce, or
16 otherwise requiring compliance with any prohibition on Plaintiffs’ engagement in
17 religious services, practices, or activities at which the County of San Diego’s Social
18 Distancing and Sanitation Protocol and Safe Reopening Plan is being followed.

19 2. Defendants shall show cause, on _____, 2020, at
20 _____ why a preliminary injunction should not issue requiring Defendants to act
21 as described in above; the temporary restraining order shall remain effective until
22 such time as the Court has ruled on whether a preliminary injunction should issue.
23 Such relief is necessary to prevent Defendants from further violating Plaintiffs’
24 constitutional rights, pending trial on the merits of Plaintiffs’ claims.

25 **Plaintiffs request that this temporary restraining order issue prior to the**
26 **weekend of May 16–17, 2020, so that religious services can be celebrated.**

27 This Application is made on the grounds that Plaintiffs are likely to succeed on
28 the merits of this case, they will suffer irreparable harm without injunctive relief, the

1 balance of equities tips sharply in their favor, and the relief sought is in the public
2 interest.

3 Good cause exists to issue the requested Order to preserve Plaintiffs' rights
4 under the Constitution of the United States and the Constitution of the State of
5 California, and to avoid irreparable harm to those rights. This Application is
6 supported by the accompanying Memorandum of Points and Authorities, by the
7 declarations of Bishop Arthur Hodges III, Dr. George Delgado, M.D., and Jeffrey M.
8 Trissell, Esq., and all exhibits attached thereto, by accompanying Request for Judicial
9 Notice, and by such further argument and evidence that may be adduced at any
10 hearing on this matter or of which the Court may take judicial notice.

11 The Complaint in this action was filed in the morning of Friday, May 8, 2020,
12 and a First Amended Complaint was filed on May 11, 2020. Counsel for all parties
13 participated in a conference call on May 11, 2020, in which the relief sought by this *ex*
14 *parte* application was discussed, and it became clear that Defendants opposed the
15 relief. This Application followed. All papers relating to this Application will be
16 delivered by email to the Defendants' counsel immediately after they are filed.

17 Plaintiffs request that the Court waive any bond requirement, because
18 enjoining Defendants from unconstitutionally prohibiting religious practices will not
19 financially affect Defendants.

20

21

Respectfully submitted,

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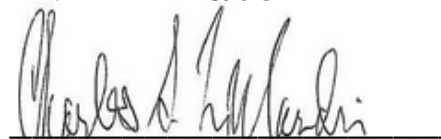
LiMANDRI & JONNA LLP

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Dated: May 11, 2020

By:



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Paul M. Jonna

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Jeffrey M. Trissell

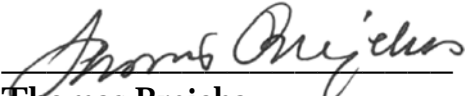
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Dated: May 11, 2020

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Peter Breen
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Dated: May 11, 2020

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Case No.: 3:20-cv-00865-AJB-MDD

**Memorandum of Points &
Authorities in Support of
Application for a Temporary
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INTRODUCTION

1
2 This case concerns a series of “Stay-At-Home” Orders issued by the State and
3 the County of San Diego, as most recently amended on May 7 and 10, 2020, as part of
4 an effort to curb the coronavirus pandemic. This case is *not* about whether the
5 government has a compelling interest in curbing pandemics. It does. *Nor* is this case
6 about whether the government may limit some personal liberties. It can. *Nor* is this
7 case about the constitutionality of the prior executive orders issued in March that
8 permitted “life-sustaining” businesses to stay open. Those orders are irrelevant.

9 No, this case is about California’s modifications to its Stay-At-Home order
10 made by Governor Newsom’s May 7, 2020, “Resilience Roadmap,” and the County
11 of San Diego’s May 10, 2020, order implementing it. (generally, the “Orders” or the
12 “Reopening Plan”). (Complaint Ex. 1-3; Ex. 2-1.) Under the Reopening Plan,
13 manufacturing and retail (bookstores, clothing stores, florists, and sporting goods)
14 opened on Friday, May 8 (Stage 2a). Offices, seated dining at restaurants, shopping
15 malls, and schools will open a few weeks after that (Stage 2b). And churches will open
16 a few months after that, alongside movie theaters as well as hair and nail salons, and
17 tattoo parlors (Stage 3). Under the Supreme Court’s well-settled Free Exercise
18 jurisprudence, this Reopening Plan is unconstitutional.

19 The original orders from March 2020 allowed “essential businesses” (as
20 determined by government officials on an *ad hoc* basis) to continue operations subject
21 to strict social distancing guidelines. For example, these orders permitted marijuana
22 dispensaries, fast food restaurants, liquor stores, “the entertainment industries,” and
23 movie studios to continue operations. (Complaint Ex. 1-2, at 23.) By contrast, the
24 original orders prohibited religious leaders and churches like Plaintiffs from holding
25 worship services and ceremonies.

26 Under the original orders, Defendants insisted that all religious worship take
27 place only at home, by live-streaming—apparently assuming that all Californians have
28 access to high-speed internet, computer equipment, a desire to add intrusive, data-

1 collecting apps to their computer devices, and the willingness to suspend a lifetime of
2 worship practices at the command of the government. And in doing their part to curb
3 their pandemic, Plaintiffs chose to abide by them.

4 But the Reopening Plan is beyond the pale. Communal worship and ministry are
5 at the heart of Plaintiffs' religious beliefs and practices. But these new stay-at-home
6 orders continue making it a crime for a congregant to even step foot inside a synagogue,
7 while permitting visits to bookstores and clothing stores, and soon offices and dine-in
8 restaurants. (Complaint, Ex. 1-3.)

9 The hard-fought rights afforded by the U.S. and California Constitutions are not
10 up for debate; these rights belong to the People. "The imperative necessity for
11 safeguarding these rights to procedural due process under the gravest of emergencies
12 has existed throughout our constitutional history, for it is then, under the pressing
13 exigencies of crisis, that there is the greatest temptation to dispense with fundamental
14 constitutional guarantees which, it is feared, will inhibit governmental action."
15 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963).

16 Because the Reopening Plan imposes substantial burdens on their religious
17 beliefs and practices, Plaintiffs are suffering immediate, irreparable harm to their
18 fundamental constitutional rights. Accordingly, Plaintiffs seek a narrow temporary
19 restraining order enjoining Defendants' enforcement of the Reopening Plan as applied
20 against Plaintiffs—and thus moving them from Stage 3 of the Reopening Plan to Stage
21 2—so they can conduct services on the weekend of May 16–17, 2020. Essentially, they
22 seek an order precluding the enforcement of the Reopening Plan so long as they comply
23 with the general guidelines that permit other businesses to keep their doors open.

24 Plaintiffs meet the standards for a temporary restraining order. *First*, they are
25 likely to succeed on the merits of their claims. In both purpose and effect, the Reopening
26 Plan targets Plaintiffs for discriminatory treatment merely because of their religious
27 beliefs and practices in violation of the First Amendment's Free Exercise Clause.
28 *Second*, the religiously discriminatory Reopening Plan is irreparably harming Plaintiffs'

1 fundamental constitutional rights. Without relief, Plaintiffs will continue to suffer
 2 irreparable harm, and will remain subject to fines and criminal penalties for exercising
 3 their religious beliefs. *Third*, the balance of harms tips sharply in Plaintiffs' favor. As
 4 noted, Plaintiffs face the loss of core constitutional rights and the inability to practice
 5 their faith. The cost of an injunction to the government, by contrast, is negligible,
 6 especially because the orders already allow countless activities and operations that
 7 engage in precisely what Plaintiffs seek to do. *Fourth*, a restraining order is warranted
 8 because vindicating constitutional rights is always in the public interest.

9 **FACTUAL BACKGROUND**

10 **A. The Government "Stay-at-Home" Orders**

11 This case arises from executive orders issued by the State and the County of San
 12 Diego to prevent the spread of the novel coronavirus. On March 4, 2020, California
 13 Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of
 14 COVID-19. (Trissell Decl., Ex. A.) Two weeks later, on March 19, 2020, the Governor
 15 issued Executive Order N-33-20, which ordered all individuals living in the State of
 16 California to stay home or at their place of residence. (Complaint, Ex. 1-1, Ex. 1-2.) On
 17 May 7, 2020, the Governor published his Resilience Roadmap which modified the
 18 prior order with respect to certain businesses. (Complaint, Ex. 1-3.) For all other
 19 entities, Governor Newsom's directives remain in effect, prohibiting all religious
 20 leaders from conducting in-person and out-of-home religious services.

21 Governor Newsom's stay-at-home order has exceptions, namely workers
 22 "needed to maintain continuity of operations of the federal critical infrastructure
 23 sectors." (Complaint, Ex. 1-1.) On March 22, 2020, the State elaborated on the
 24 exception by releasing a list of "Essential Critical Infrastructure Workers."
 25 (Complaint, Ex. 1-2.) Included on this list are "faith based services that are provided
 26 through streaming or other technology." (Complaint, Ex. 1-2, at 16.)

27 Since Governor Newsom's Executive Order was first signed on March 16, 2020,
 28 the COVID-19 pandemic has flattened considerably and, in the Governor's words,

1 “stabilized.” (*See* Trissell Decl., ¶¶ 12–19, Exs. B–D; Delgado Decl., ¶¶ 5–23; Req.
 2 for Jud. Ntc., Exs. O–P.) As a result, on April 28, 2020, Governor Newsom held a press
 3 conference in which he announced California’s current four-stage Reopening Plan.
 4 (Trissell Decl., ¶¶ 20–27, Ex. E.)

5 “Stage 1” of the plan began on March 16, and will continue until the Executive
 6 Order is modified. (Trissell Decl., ¶ 20, Ex. E.) “Stage 2” of the Reopening Plan
 7 allows retail (“bookstores, clothing stores, florists and sporting goods stores,”) as well
 8 as offices and manufacturing businesses, to begin reopening on Friday, May 8. (Trissell
 9 Decl., ¶¶ 22, 28, Ex. E; Ex. F.) Religious services are relegated to “Stage 3” along with
 10 movie theaters and hair and nail salons: “[T]hings like getting your hair cut, uh getting
 11 your nails done, doing anything that has very close inherent relationships with other
 12 people, where the proximity is very close.” (Trissell Decl., ¶¶ 23–27, Ex. E.) “Stage
 13 4” is the end of all COVID-19 related executive orders. (Trissell Decl., ¶ 20.)

14 On May 8, 2020, California’s Reopening Plan became effective, and was
 15 published online. (Complaint, Ex. 1-3; Ex. 1-4.) On May 10, 2020, the County of San
 16 Diego issued an order that incorporated Governor Newsom’s executive orders and
 17 further established a “Social Distancing and Sanitation Protocol” for “essential
 18 businesses” operating in San Diego County. (Complaint, Ex. 2-2.) The order also
 19 established a “Safe Reopening Plan” Protocol for “reopening businesses” that will be
 20 resuming business. (Complaint, Ex. 2-3.) The order also banned all gatherings of
 21 “more than one person” except at essential businesses, reopening businesses, or
 22 transit places. (Complaint, Ex 2-1.)

23 **B. Plaintiffs Bishop Hodges and South Bay Pentecostal Church.**

24 Bishop Arthur Hodges III is Senior Pastor of South Bay Pentecostal Church, a
 25 diverse Christian community in Chula Vista, California. Every Sunday, the church
 26 holds three to five worship services, where congregants “come together with one
 27 accord” to pray and worship. (Bishop Hodges Decl., ¶ 12.) Along with worship
 28 services, the church ministers to the faithful by performing baptisms, funerals,

1 weddings, and other religious ceremonies. (Bishop Hodges Decl. ¶ 15.)

2 The Orders have upended South Bay Pentecostal Church’s ministry, shuttered
3 its sanctuary, and stifled Bishop Hodge’s God-given call to shepherd his flock. The
4 Orders prohibit Bishop Hodges from baptizing believers. They shut out the sick from
5 receiving spiritual healing at the altar. And they criminalize the 2,000-year-old
6 tradition of Christians gathering together so that Christ may be in their midst. (Bishop
7 Hodges Decl., ¶ 10.) In short, the Orders have both suppressed and repressed Bishop
8 Hodges and his church’s religious beliefs and practices.

9 Bishop Hodges is prepared to carry on the South Bay Pentecostal Church’s
10 religious ministries consistent with federal, state, and county social distancing
11 guidelines and other preventative measures. For example:

- 12 • South Bay Pentecostal Church is large enough to ensure the six feet of
13 separation between congregants.
- 14 • The Church can provide or allow masks, gloves, and other screening
15 mechanisms to protect congregants and inhibit the spread of COVID-19
16 during services and ceremonies.
- 17 • The Church will require any congregant who is sick or is displaying
18 symptoms to stay at home.

19 (Bishop Hodges Decl., ¶¶ 24–31.)

20 Plaintiffs are not seeking special treatment; they deserve equal treatment. If
21 retail, manufacturing, offices, and restaurants can abide by the government’s social
22 distancing guidelines, then so can a church.

23 **LEGAL STANDARD**

24 The standards for issuing a temporary restraining order and a preliminary
25 injunction are the same. *See, e.g., Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co.,*
26 *Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking a temporary restraining
27 order must establish (1) that he is likely to succeed on the merits, (2) that he is likely
28 to suffer irreparable harm without injunctive relief, (3) that the balance of harm tips in

1 his favor, and (4) that a temporary restraining order is in the public interest. *See All. for*
 2 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011) (citing *Winter v. Natural*
 3 *Res. Def. Council*, 555 U.S. 7, 20(2008). The Ninth Circuit evaluates these factors
 4 through a “sliding scale approach.” *All. for the Wild Rockies*, 632 F.3d at 1131. So, for
 5 example, “a stronger showing of irreparable harm to plaintiff might offset a lesser
 6 showing of likelihood of success on the merits.” *Id.*

7 ARGUMENT

8 1. Plaintiffs Will Likely Succeed on the Merits of Their Constitutional Claims

9 1.1. The Orders violate Plaintiffs’ Free Exercise Rights because they 10 impose a penalty on their sincerely held religious practices.

11 The Free Exercise Clause of the First Amendment provides: “Congress shall
 12 make no law respecting an establishment of religion, or *prohibiting the free exercise*
 13 *thereof.*” U.S. Const. amend. I (emphasis added). Under the Free Exercise Clause, a
 14 law that “discriminates against some or all religious beliefs or regulates or prohibits
 15 conduct because it is undertaken for religious reasons” is subject to strict scrutiny.
 16 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). To
 17 survive that “stringent standard,” the government must prove that the law is narrowly
 18 tailored to further a compelling government interest. *Trinity Lutheran Church of*
 19 *Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). As discussed below, the
 20 Reopening Plan cannot survive strict scrutiny.

21 To be sure, “the right of free exercise does not relieve an individual of the
 22 obligation to comply with a ‘valid and neutral law of general applicability.’” *Emp’t Div.*
 23 *v. Smith*, 494 U.S. 872, 879 (1990). Thus, a law that is “neutral” and “generally
 24 applicable” is not subject to strict scrutiny even if it has the incidental effect of
 25 burdening a religious belief or practice. *See id.* But this “rule comes with an
 26 exception.” *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). When the policy
 27 “appears to be neutral and generally applicable on its face, but in practice is riddled
 28 with exemptions,” it “must run the gauntlet of strict scrutiny.” *Id.* at 740.

1 **1.1.1. The Orders are not generally applicable because they are**
 2 ***riddled with exceptions.***

3 A law is not generally applicable if it targets a particular religious belief or
 4 practice for discriminatory treatment “through [its] design, construction, or
 5 enforcement.” *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). Here, the Reopening
 6 Plan and the Orders fail the generally applicable requirement because they are
 7 underinclusive, exempting “nonreligious conduct that endangers [the government’s]
 8 interests in a similar or greater degree than [the prohibited religious conduct].” *Id.* at
 9 543. For example, the Reopening Plan exempts a laundry list of industries and services
 10 purportedly “essential” to the government’s various interests, including originally the
 11 entire entertainment industry, medical cannabis dispensaries and liquor stores, and
 12 now retail stores and manufacturing related to retail stores. (Complaint, Ex. 1-2, Ex. 1-
 13 3.) And the Reopening Plan will soon reopen offices and restaurants. (Complaint Ex.
 14 1-3; Ex. 1-4.)

15 By contrast, the Reopening Plan, “in a selective manner[,] impose[s] burdens
 16 only on conduct [because it is] motivated by religious belief.” *Lukumi*, 508 U.S. at 543.
 17 That religiously motivated conduct is Plaintiffs’ holding communal worship services
 18 and faith-based ceremonies, both of which the Reopening Plan prohibits. To be sure,
 19 that ban has burdened Plaintiffs’ religious rights:

20 [Despite Bishop Hodges’ 600 capacity church] [o]ne
 21 congregant’s service was held in a funeral home that limited
 22 attendees to ten people and imposed social distancing
 23 measures, which resulted in much of the decedent’s family
 24 being denied participation. Funeral personnel filmed the
 25 entire proceeding out of concern for liability should one of
 26 the participants fall ill. Such a service is a poor substitute to
 27 allowing the deceased’s extended family of faith gather to
 offer comfort, support, and verbal statements of faith in the
 salvation of the departed.

28 (Bishop Hodges Decl., ¶ 23.)

1 But the government cannot provide exemptions to secular facilities on the
2 ground that they are “essential” while denying parallel exemptions to churches and
3 synagogues that practice the same or similar degree of preventative measures. That is
4 because favoring non-religiously motivated activities over religiously motivated
5 activities constitutes a forbidden governmental “value judgment.” *Fraternal Order of*
6 *Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

7 Relatedly, the Orders are not generally applicable because they have been
8 “enforced in a discriminatory manner.” *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209
9 (3d Cir. 2004). “Discriminatory laws come in many forms.” *Maryville Baptist Church,*
10 *Inc. v. Beshear*, --- F.3d ---, 2020 WL 2111316, at *3 (6th Cir. 2020). Although all
11 persons and entities must follow strict social distancing guidelines, the government’s
12 enforcement of these measures are negligible. Yet because South Bay Pentecostal
13 Church is an established place of worship, Plaintiffs have a target on their back were
14 they to restart their religious services and ceremonies. In short, the Government’s
15 practice has been to enforce its Stay-At-Home Orders against religious persons and
16 churches like Plaintiffs while making little effort to enforce them against widespread
17 and widely known violations of the social distancing guidelines that threaten the public
18 health just as much as, or more than, Plaintiffs’ conduct.¹ Thus, the Orders are not
19 generally applicable.

20 The Reopening Plan as applied also falls “well below the minimum standard”
21 of general applicability because the scheme is substantially “underinclusive” and
22 riddled with categorical and individualized exemptions. *Lukumi*, 508 U.S. at 543. This
23

24 ¹ In *Abiding Place Ministries* and *Cross Culture Christian Ctr.*, discussed in the next
25 section, the factual record involved actual police enforcement, or threats of police
26 enforcement, levelled against churches trying to reopen. See Verified Complaint,
27 *Abiding Place Ministries v. Cty. of San Diego*, No. 20-cv-0683-BAS, 2020 WL 1881323
28 (S.D. Cal. Apr. 9, 2020); Order, *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-CV-
00832-JAM-CKD, 2020 WL 2121111 (E.D. Cal. May 5, 2020). This is despite well-
publicized statements by Governor Newsom and San Diego officials that no
enforcement would be forthcoming. (Trissell Decl., ¶¶ 9–11.)

1 includes both the original Stage 1 “essential businesses” of the movie industry, liquor
 2 stores and cannabis dispensaries, and the new Stage 2 “essential businesses” of retail,
 3 offices, manufacturing, and schools. (Complaint, Ex. 1-3.) “Neutrality and general
 4 applicability are interrelated,” and “the failure to satisfy one requirement is a likely
 5 indication that the other has not been satisfied.” *Lukumi*, 508 U.S. at 531.

6 In sum, the record shows that the Government has not been, and is not, acting
 7 in a neutral manner required under the Free Exercise Clause. Thus, strict scrutiny is
 8 required. At least four federal courts have held as much, determining that executive
 9 orders distinguishing between “essential” and “non-essential” businesses must
 10 satisfy the strict scrutiny analysis set forth in *Lukumi*. See, e.g., *Maryville Baptist*
 11 *Church*, 2020 WL 2111316, at *3; *On Fire Christian Ctr., Inc. v. Fischer*, --- F. Supp. 3d
 12 ---, 2020 WL 1820249, at *6 (W.D. Ky. 2020); *First Baptist Church v. Kelly*, --- F. Supp.
 13 3d ---, 2020 WL 1910021, at *6 (D. Kan. 2020); *Tabernacle Baptist Church, Inc. of*
 14 *Nicholasville, Kentucky v. Beshear*, No. 3:20-CV-00033-GFVT, 2020 WL 2305307, at
 15 *5 (E.D. Ky. May 8, 2020) (Trissell Decl., Exs. G–J).

16 And this is the position of the Department of Justice, reflected in multiple
 17 memoranda published by Attorney General Barr, as well as briefs filed by the DOJ in
 18 cases across the country. See, e.g., Statement of Attorney General William P. Barr on
 19 Religious Practice and Social Distancing (Apr. 14, 2020); Memorandum for the
 20 Assistant Attorney General for Civil Rights and All United States Attorneys (Apr. 27,
 21 2020); U.S. DOJ Statement of Interest, *Temple Baptist Church v. City of Greenville*, No.
 22 4:20-cv-64-DMB-JMV, ECF No. 6 (N.D. Miss. Apr. 14, 2020); U.S. DOJ Statement
 23 of Interest, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK,
 24 ECF No. 19 (E.D. Va. May 3, 2020) (Trissell Decl., Exs. K–N).

25 **1.1.2. The prior lawsuits the California Attorney General has**
 26 **litigated are distinguishable.**

27 In the past month, three other challenges have been brought against California’s
 28 suppression of religious rights. Each resulted in a denial of the motion for a temporary

1 restraining order. *Abiding Place Ministries v. Cty. of San Diego*, No. 20-cv-0683-BAS,
2 ECF No. 10 (S.D. Cal. Apr. 10, 2020);² *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx),
3 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *Cross Culture Christian Ctr. v. Newsom*,
4 No. 2:20-CV-00832-JAM-CKD, 2020 WL 2121111 (E.D. Cal. May 5, 2020). All three
5 wrongly asserted that *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)
6 applied (discussed *infra*), and on that basis, held that Governor Newsom’s and the
7 county orders at issue there were permissible. But all three also proceeded to analyze
8 the executive orders under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508
9 U.S. 520 (1993). A careful analysis of these cases, however, shows that they are
10 distinguishable or made serious constitutional errors.

11 First, as an exemplar, the court in *Gish* stated that there was no “palpable
12 invasion” of the plaintiffs’ religious rights because the plaintiffs “remain free to
13 practice their religion in whatever way they see fit so long as they remain within the
14 confines of their own homes. Although physical contact with others is curtailed, a wide
15 swath of religious expression remains untouched by the Orders.” *Gish*, 2020 WL
16 1979970, at *5. But problematically, this reasoning places the court in the untenable
17 position of deciding which aspects of a faith are important and what are peripheral.
18 This is no place for a court to be. *See, e.g., Serbian E. Orthodox Diocese for U. S. of Am.*
19 *& Canada v. Milivojevich*, 426 U.S. 696, 714 (1976) (court could not adjudicate
20 “theological controversy” of whether bishop was properly defrocked); *Presbyterian*
21 *Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440,
22 451 (1969) (court could not adjudicate question of the “tenets of faith and practice” of
23 a church).

24 Second, all three cases dealt with the Governor’s prior list of “essential
25 businesses” (Complaint, Ex. 1-2), not the current list in the Resilience Roadmap of
26

27 ² The court in *Abiding Place Ministries* did not publish a written opinion, but denied the
28 request for a temporary restraining order on the bases stated at a hearing.

1 “reopening businesses.” (Complaint Ex. 1-3). In that respect, *Gish* focused on how
 2 under the prior regime order “schools are closed, restaurants are shuttered” and
 3 “citizens cannot visit public recreation spaces” *Gish*, 2020 WL 1979970, at *6.³ As a
 4 result, the court concluded that the Orders were narrowly tailored to only prohibit
 5 “activities where people sit together in an enclosed space to share a communal
 6 experience.” *Id.* But this argument is problematic for multiple reasons. In Stage 2,
 7 manufacturing, schools, offices, and childcare facilities will reopen. (Complaint, Ex. 1-
 8 3.) These are “activities where people sit together in an enclosed space to share a
 9 communal experience.” *Gish*, 2020 WL 1979970, at *6. Thus, at least when offices and
 10 restaurants reopen within a “few weeks,” places of worship that follow the same public
 11 health guidelines must also be allowed to reopen. (Trissell Decl., ¶¶ 17, 21.)⁴

12 But of course, as the three California cases themselves acknowledge, the Orders
 13 and Reopening Plan already permitted “essential businesses” such as the
 14 “entertainment industries” to stay open even if they have “activities where people sit
 15 together in an enclosed space to share a communal experience.” *Gish*, 2020 WL
 16 1979970, at *6. Numerous “essential offices” remain open, but “[h]ow are in-person
 17 [office] meetings with social distancing any different from . . . church services with
 18 social distancing?” *Maryville Baptist Church*, 2020 WL 2111316, at *2.

19 The courts then incorrectly concluded that the Executive Orders could assert
 20 *value judgments* that worship is *not* essential: “[T]hese are all essential services: without
 21

22 ³ The analysis was the same in *Abiding Place Ministries*, ECF No. 10 at 18 (“To the
 23 extent there are secular exemptions like grocery stores, gas stations, banks, the need
 24 for these exemptions is clear. There’s no way these services could be provided
 25 remotely”); and *Cross Culture Christian Ctr.*, 2020 WL 2121111, at *6 (“[T]he type of
 26 gathering that occurs at in-person religious services is much more akin to conduct the
 27 orders prohibit—attending movies, restaurants, concerts, and sporting events—than
 28 that which the orders allow.”).

⁴ It appears that by a “few weeks,” the State means that restaurants and similar
 establishments can open after individual counties certify to the State that they have satisfied
 certain metrics on the numbers of cases and deaths. [www.cdph.ca.gov/Programs/
 CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-Attestation-Memo.aspx](http://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-Attestation-Memo.aspx).

1 access to the food and medicines sold at these locations, more citizens would become
 2 ill or die.” *Gish*, 2020 WL 1979970, at *6. “The State’s order expressly states it took
 3 other considerations into account, *i.e.*, continuing non-COVID-19 emergency services,
 4 providing clean water, protecting the state’s supply chains, etc.” *Cross Culture*
 5 *Christian Ctr.*, 2020 WL 2121111, at *6. This is the Government’s position: that
 6 worship is not valuable because it is high risk and “low reward.” (Trissell Decl., ¶ 29.)

7 Of course, protecting life is a commendable value, but the imposition of a value
 8 judgment at all is problematic and requires imposition of strict scrutiny. *Fraternal*
 9 *Order of Police*, 170 F.3d at 366 (“[T]he Department has made a value judgment that
 10 . . . medical[] motivations . . . are important enough . . . but that religious motivations
 11 are not.”). Otherwise, which value judgments will be deemed sufficient? On May 8,
 12 “bookstores, clothing stores, florists and sporting goods stores” were allowed to open.
 13 (Trissell Decl., ¶¶ 28, Ex. F.) None of these stores are needed to save lives. Perhaps
 14 “bookstores” are needed to promote California’s interest in education, but if so, where
 15 does the list stop? Mental health could justify opening up restaurants and all recreation
 16 facilities—presumably that is why the entertainment industry was deemed essential
 17 wholesale. Under *Lukumi* and its progeny, *any* exceptions require the application of
 18 strict scrutiny. As one court recently noted in enjoining an executive order similar to
 19 the one at issue here, “If social distancing is good enough for Home Depot and Kroger,
 20 it is good enough for in-person religious services which, unlike the foregoing, benefit
 21 from constitutional protection.” *Tabernacle Baptist Church*, 2020 WL 2305307, at *5.

22 **1.1.3. The Orders are not also neutral because they impose special**
 23 **burdens on Plaintiffs *because of* their religious practices.**

24 Under the First Amendment’s Free Exercise Clause, the government may not
 25 “discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct
 26 *because it is undertaken* for religious reasons.” *Lukumi*, 508 U.S. at 532 (emphasis
 27 added). Nor may the government “target the religious for special disabilities based on
 28 their religious status.” *Id.* at 533 (quoting *Smith*, 494 U.S. at 877). And it may not

1 punish an organization’s “religiously motivated” conduct. *Trinity Lutheran*, 137 S. Ct.
2 at 2021. Here, the stay-at-home orders are not neutral because they put Plaintiffs to a
3 choice: They must suppress their sincerely held religious beliefs and practices or face
4 fines and criminal penalties. That discrimination impermissibly “imposes a penalty on
5 the free exercise of religion” that either invalidates the orders or, at the very least,
6 “triggers the most exacting scrutiny.” *Id.*

7 The Orders are also not neutral because “the interpretation given to [them] by
8 [the government]” favors secular conduct over comparable religious activities.
9 *Lukumi*, 508 U.S. at 537. Defendants have broad discretion to interpret the Orders on
10 an *ad hoc* basis and similar discretion to punish conduct based on subjective
11 determinations. For example, Defendants have arbitrarily declared what types of
12 gatherings or groupings of people are permissible, as long as social distancing practices
13 are observed. (Complaint, Ex. 1-2; Ex. 1-3.) Since these gatherings may be permitted,
14 Defendants must permit Plaintiffs to engage in equivalent religious activities and
15 services, as long as Plaintiffs also adhere to the same public health measures.

16 Yet that is not so. The Orders specifically exclude churches and other places of
17 worship from their exceptions. But as asked by the Sixth Circuit:

18 How are in-person [office] meetings with social distancing
19 any different from . . . church services with social
20 distancing? . . . Why can someone safely walk down a
21 grocery store aisle but not a pew? And why can someone
22 safely interact with a brave deliverywoman but not with a
23 stoic minister? . . . While the law may take periodic naps
during a pandemic, we will not let it sleep through one.

24 *Maryville Baptist Church*, 2020 WL 2111316, at *4. And as stated forcefully by Attorney
25 General Barr:

26 But even in times of emergency . . . the First Amendment and
27 federal statutory law prohibit discrimination against religious
28 institutions and religious believers. Thus, government may
not impose special restrictions on religious activity that do

1 not also apply to similar nonreligious activity. For example, if
 2 a government allows movie theaters, restaurants, concert
 3 halls, and other comparable places of assembly to remain
 4 open and unrestricted, it may not order houses of worship to
 5 close, limit their congregation size, or otherwise impede
 religious gatherings. Religious institutions must not be
 singled out for special burdens.

6 Statement of Attorney General William P. Barr (Trissell Decl., Ex. K).

7 In sum, the Supreme Court has held that a “law targeting religious belief as such
 8 is never permissible.” *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. Any attempt to “punish
 9 the expression of religious doctrines” or “impose special disabilities on the basis of
 10 religious views” is categorically forbidden. *Smith*, 494 U.S. at 877 (citations omitted).
 11 That is what the Government is doing here, and for that reason, the Orders are not
 12 neutral toward religion.

13 **1.1.4. The California Constitution mandates strict scrutiny.**

14 Even if the Reopening Plan were generally applicable, the California
 15 Constitution—which essentially acts as a state RFRA—already mandates application
 16 of strict scrutiny. Under the California Constitution, “the religion clauses of the
 17 California Constitution are read more broadly than their counterparts in the federal
 18 Constitution.” *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 629 (9th Cir.
 19 1996). Courts automatically “therefore review [a] challenge . . . under the free exercise
 20 clause of the California Constitution in the same way [they] might have reviewed a
 21 similar challenge under the federal Constitution after *Sherbert*, and before *Smith*. In
 22 other words, we apply strict scrutiny.” *Catholic Charities of Sacramento, Inc. v. Superior*
 23 *Court*, 32 Cal. 4th 527, 562 (2004).

24 **1.1.5. The Orders *fail strict scrutiny* because they are not narrowly
 25 tailored to curbing the pandemic.**

26 Given that the new Resilience Roadmap violates Plaintiffs’ free exercise of
 27 religion, it must withstand “the strictest scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2019.
 28 The Government thus has the burden to prove that its laws further a compelling

1 government interest and are narrowly tailored to achieve that end. Strict scrutiny is
2 “the most demanding test known to constitutional law,” and government action that
3 imposes special burdens on religious beliefs and practices will survive it “only in rare
4 cases.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Governor Newsom’s
5 Reopening Plan is not one of those cases.

6 To satisfy the first prong of strict scrutiny, the Reopening Plan must advance a
7 compelling government interest “of the highest order.” *Wisconsin v. Yoder*, 406 U.S.
8 205, 215 (1972). Plaintiffs do not dispute that the government has a compelling interest
9 in curbing the novel coronavirus. Nor do Plaintiffs dispute that the Stay-At-Home
10 Orders further that interest. But the Orders fail strict scrutiny—and are therefore
11 unconstitutional—because they are not narrowly tailored to achieve the Government’s
12 objectives. Specifically, the Orders are overbroad and go “far beyond what was
13 reasonably required for the safety of the public.” *Jacobson*, 197 U.S. at 28.

14 The compelling interest prong requires a “focused inquiry” that does not turn
15 on whether the government has a compelling interest in enforcing the Orders in the
16 abstract. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). In other words,
17 “then everybody will want an exception” is not a compelling interest. Instead, courts
18 should “look[] beyond broadly formulated interests justifying the general applicability
19 of government mandates and scrutinize[] the asserted harm of granting specific
20 exemptions to particular religious claimants.” *Gonzales v. O Centro Espirita Beneficente*
21 *Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Thus, the Court should determine whether
22 the Government has a compelling interest in not permitting South Bay Pentecostal
23 Church to open.

24 Here, any compelling interest the Government may have in violating Plaintiffs’
25 free exercise rights are defeated by the Orders’ under-inclusivity. As noted above, a
26 law cannot further a compelling interest when it “fail[s] to prohibit nonreligious
27 conduct that endangers [its asserted] interests in a similar or greater degree” than the
28 religious conduct. *See Lukumi*, 508 U.S. at 543.

1 Because the Orders allow broad exemptions to its stay-at-home mandate, the
2 Government cannot claim that stopping the spread of COVID-19 is a compelling
3 enough interest to shutter South Bay Pentecostal Church. The Government must
4 instead identify a compelling interest actually consistent with its broader powers—
5 *exemptions and all*. Unless it does so, the Government is left with discriminatory
6 decrees that “leave[] appreciable damage to [its] supposedly vital interest
7 unprohibited.” which is fatal under the Free Exercise Clause. *Lukumi*, 508 U.S. at 547.
8 But there is no compelling interest that requires the shutting *only* of churches but not
9 other facilities.

10 In this case, treating Plaintiffs equally and permitting them to hold worship
11 services and other religious ceremonies at South Bay Pentecostal Church would not
12 jeopardize the public health. (Delgado Decl., ¶¶ 14–23.) Bishop Hodges is committed
13 to following the County of San Diego and the Center for Disease Control’s public
14 health guidelines, including strict social distancing measures. He is not asking for
15 special treatment; he is only asking for equal treatment. Defendants have “no good
16 reason so far for refusing to trust the congregants who promise to use care in worship
17 in just the same way it trusts accountants, lawyers, and laundromat workers to do the
18 same.” *Maryville Baptist Church*, 2020 WL 2111316, at *4.

19 **1.1.6. If *Jacobson* applies, it is only minimally relevant.**

20 Over a hundred years ago, the Supreme Court addressed whether the
21 constitution protected an individual’s right to refuse the smallpox vaccine in
22 contravention of a local ordinance. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S.
23 11 (1905). *Jacobson* explained that governments can validly enact liberty infringing
24 restrictions to stop the spread of diseases, but they cannot do so in “an arbitrary,
25 unreasonable manner,” or in a way that “go[es] so far beyond what was reasonably
26 required for the safety of the public.” *Id.* at 28. Thus, when evaluating challenges to
27 laws “purporting to have been enacted to protect the public health, the public morals,
28 or the public safety,” courts must ask whether the law “has no real or *substantial*

1 relation to those objects, *or* is, beyond all question, a plain, palpable invasion of rights
 2 secured by the fundamental law.” *Id.* (emphasis added). This is a fact-intensive inquiry
 3 looking at the “ necessities of the case.” *Id.*

4 Beginning on April 6 with the Western District of Oklahoma, courts have been
 5 citing *Jacobson* with respect to restrictions on abortion rights during the current
 6 pandemic. *S. Wind Women’s Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094
 7 (W.D. Okla. Apr. 6, 2020). *Jacobson* was decided before most modern constitutional
 8 jurisprudence, and is therefore a bit of an outlier. But because it deals with bodily
 9 integrity, autonomy, and medicine, it is a decent fit in the context of abortion rights.
 10 To date, the Fifth, Sixth, Eighth, and Eleventh have analyzed *Jacobson* with relation to
 11 restrictions on abortion rights during the pandemic.⁵

12 However, *Jacobson* was decided decades before the First Amendment was held
 13 to apply to the States by incorporation, and was not a case specifically about regulations
 14 of churches. So it is not plain that it should apply in this case at all.⁶ This is implied by
 15 the Sixth Circuit’s opinions—the only circuit to yet address a Free Exercise challenge
 16 to pandemic restrictions. The Sixth Circuit cited *Jacobson* in both its abortion and Free
 17 Exercise cases, but only analyzed it in the former. In the latter, it largely ignored it and
 18 concluded simply that “ restrictions inexplicably applied to one group and exempted
 19 from another do little to further these goals and do much to burden religious freedom.”
 20 *Maryville Baptist Church*, 2020 WL 2111316, at *4; *see also First Baptist Church*, 2020
 21 WL 1910021, at *6 (concluding that *Lukumi*, not *Jacobson*, controlled).

22 If the Court holds that *Jacobson* does apply, then as indicated above, there are
 23 two questions the Court must analyze. Under the second question, “ invasion of rights

24 _____
 25 ⁵ *In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, No. 20-
 26 5408, 2020 WL 1982210 (6th Cir. Apr. 24, 2020); *In re Rutledge*, No. 20-1791, 2020
 27 WL 1933122 (8th Cir. Apr. 22, 2020); *Robinson v. Attorney Gen.*, No. 20-11401-B, 2020
 28 WL 1952370 (11th Cir. Apr. 23, 2020).

⁶ *See Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the Free Speech Clause
 against the States); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Free Assembly
 Clause); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (Right to Petition).

1 secured by the fundamental law,” the courts have generally found for practical
2 purposes that the “fundamental law” is simply the constitutional law readily
3 determinable from precedent. *See, e.g., Adams & Boyle*, 2020 WL 1982210, at *9 (“ As
4 of today, a woman’s right to a pre-viability abortion is a part of ‘the fundamental
5 law.’ ”); *Robinson*, 2020 WL 1952370, at *6 (“ [T]o the extent that the April 3 order
6 effectively operates as a *prohibition* on a woman’s right to obtain an abortion before
7 viability, the district court [reasonably] concluded that it is substantially likely to be
8 unconstitutional as applied”). This tracks the language of *Jacobson* itself: “[A]s the
9 laws there involved went beyond the necessity of the case, and, under the guise of
10 exerting a police power, invaded the domain of Federal authority, and *violated rights*
11 *secured by the Constitution*, this court deemed it to be its duty to hold such laws invalid.”
12 *Jacobson*, 197 U.S. at 28 (italics added).

13 Under the first prong, “no real or substantial relation to th[e] objects [of public
14 health],” the courts have again practically treated this as essentially akin to the
15 heightened scrutiny required under the Supreme Court’s much later developed
16 analyses. *See, e.g., Adams & Boyle*, 2020 WL 1982210, at *9 (“ [I]t is much harder to
17 discern that relation here, given the paltry amount of PPE saved, and limited amount
18 of in-person contact avoided, by halting procedural abortions”); *Robinson*, 2020 WL
19 1952370, at *8 (“ [T]he state did not present any evidence that applying the April 3
20 order to proscribe pre-viability abortions would in fact free up hospital space for
21 COVID-19 patients or PPE for medical providers.”). This again tracks the language of
22 *Jacobson* itself: “[I]f nothing more could be reasonably affirmed of the statute in
23 question” than “prov[ing] to be distressing, inconvenient, or objectionable to some,”
24 only then is it “the duty of the constituted authorities primarily to keep in view the
25 welfare, comfort, and safety of the many.” *Jacobson*, 197 U.S. at 28–29.

26 In other words, *Jacobson* is not separate from Plaintiffs’ constitutional claims, but
27 is shot through them. This finally track’s *Jacobson*’s own emphasis that it should not be
28 relied upon by the courts as a basis to unnecessarily refuse to act: “[I]t might be that an

1 acknowledged power of a local community to protect itself against an epidemic
2 threatening the safety of all might be exercised in particular circumstances and in
3 reference to particular persons in such an arbitrary, unreasonable manner, or might go
4 so far beyond that was reasonably required for the safety of the public, as to authorize or
5 compel the courts to interfere for the protection of such persons.” *Jacobson*, 197 U.S. at
6 28. Thus, this Court should engage the constitutional arguments in their regular course.

7 **1.2. The Orders also violate the Federal Equal Protection Clause.**

8 The Orders and Reopening Plan also violate Plaintiffs’ rights under the
9 Fourteenth Amendment. The Equal Protection Clause provides that “[n]o State shall
10 . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S.
11 Const. amend. XIV. Equal protection requires the state to govern impartially—not
12 draw distinctions between individuals based solely on differences that are irrelevant to
13 a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473
14 U.S. 432, 446 (1985).

15 Strict scrutiny under the Equal Protection Clause applies when, as here, the
16 classification impinges on a fundamental right, including the right to practice religion
17 freely, the right to free speech and assembly, and the right to travel, among others.
18 *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 701 F. Supp. 738, 742 (C.D.
19 Cal. 1988) (“When a law disadvantages a suspect class or impinges upon a ‘fundamental
20 right,’ the court will examine the law by applying a strict scrutiny standard”), *aff’d sub*
21 *nom. Maynard v. U.S. Dist. Court for Cent. Dist. of California*, 915 F.2d 1581 (9th Cir.
22 1990). Under strict scrutiny review, the law can be justified only if it furthers a
23 compelling government purpose, and, even then, only if no less restrictive alternative is
24 available. *See, e.g. Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 257–58 (1974).

25 As noted above, Defendants cannot satisfy strict scrutiny. By granting
26 exemptions for any other activity be it highly laudable (medical exemptions) or not
27 (liquor stores and retail generally), Defendants must then explain why an interest of
28 the highest order requires discriminating against Plaintiffs. This they cannot do: any

1 interests high enough to preclude Plaintiffs from holding worship services and funerals
2 is necessarily also high enough to close the entertainment industry, and liquor and
3 clothing stores. Since these places can open, Defendants must permit Plaintiffs to
4 engage in their constitutionally protected activities as long as they also adhere to the
5 same social distancing guidelines.

6 **1.3. The Orders violate the Fourteenth Amendment’s Due Process Clause.**

7 The Due Process Clause of the Fourteenth Amendment “provides heightened
8 protection against government interference with certain fundamental rights and liberty
9 interests.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). To receive
10 protection under the Due Process Clause, a right must be “deeply rooted in this
11 Nation’s history and tradition and implicit in the concept of ordered liberty such that
12 neither liberty nor justice would exist if it was sacrificed.” *Id.* (cleaned up) (quoting
13 *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), and *Palko v. Connecticut*, 302 U.S.
14 319 (1937)).

15 When analyzing a due process claim, the “crucial guideposts for responsible
16 decisionmaking” are the nation’s “history, legal traditions, and practices.” *Glucksberg*,
17 521 U.S. at 720–21. (quotation marks and citations omitted). The question is whether
18 the right is “so rooted in the traditions and conscience of our people as to be ranked as
19 fundamental.” *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934). If so, the right may
20 not be infringed “at all, no matter what process is provided, unless the infringement is
21 narrowly tailored to serve a compelling state interest.” *Glucksberg*, 521 U.S. 702, 721
22 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

23 Here, the fundamental liberty interest at stake is Plaintiffs’ right to freely
24 exercise their religious beliefs. This right is deeply rooted in our nation’s “history,
25 legal traditions, and practices.” *Id.* at 709. Indeed, the concept of religious liberty
26 stretches back to colonial times, where citizens looked to practice their religion
27 unimpeded by the government. This basic freedom sought by so many colonists was
28 enshrined in the First Amendment. Yet in March of this year, the Golden State

1 criminalized all religious assembly and communal religious worship. Consequently, the
2 Government has deprived Plaintiffs of their fundamental liberties protected under the
3 Due Process Clause.

4 The magnitude of this point should not be overlooked. Never before has the
5 Government had the gall to simply shut down all places of worship—doing so flies into
6 the heart of the prohibition against government entanglement with religion. *See*
7 *Jacobson*, 197 U.S. at 360 (“ [T]he spirit of an instrument, especially of a constitution,
8 is to be respected not less than its letter”).

9 The Supreme Court has declined to apply its regular jurisprudence under *Smith*
10 when the government seeks to interfere with church doctrine, teachings, or ministry.
11 In *Emp’t Div. v. Smith*, 494 U.S. 872 (1990), the Supreme Court cited with approval
12 several prior decisions protecting a church’s right to institutional autonomy—*i.e.*, its
13 ability to decide for itself matters of church government, faith, and doctrine without
14 state interference. *Id.* at 877 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S.
15 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*,
16 393 U.S. 440 (1969); *Kedroff v. St. Nichols Cathedral of Russian Orthodox Church in N.*
17 *Am.*, 344 U.S. 94 (1952)). Thus, the Supreme Court has never questioned its
18 longstanding holdings that “[l]egislation that regulates church administration, the
19 operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise
20 of religion,” *Kedroff*, 344 U.S. at 107–08, and federal courts “exercise *no* jurisdiction[
21 in a matter which concerns theological controversy, church discipline, [or]
22 ecclesiastical government.” *Serbian E. Orthodox Diocese*, 426 U.S. at 713–14.

23 Drawing on that line of cases, the Supreme Court held in *Hosanna-Tabor* that
24 the Free Exercise Clause bars government interference—even through a neutral law
25 of general applicability—with a church’s selection of ministers, which is “an internal
26 church decision that *affects the faith and mission of the church itself.*” *Hosanna-Tabor*
27 *Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (italics added).
28 The Executive Orders and Reopening Plan are exactly such orders “regulat[ing] . . .

1 the operation of churches,” *Kedroff*, 344 U.S. at 107–08, and “affect[ing] the faith and
2 mission of the church itself,” *Hosanna-Tabor*, 565 U.S. at 190, by dictating what type
3 of worship is permissible, and what is not. The above cases may not be on all fours with
4 the present situation, but—if nothing else—they counsel against the governmental
5 overreach at issue here.

6 **2. Plaintiffs Face Irreparable Harm Absent Immediate Injunctive Relief.**

7 The Supreme Court has made clear that “[t]he loss of First Amendment
8 freedoms, for even minimal periods of time, unquestionably constitutes irreparable
9 injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In the First Amendment context, a
10 plaintiff establishes irreparable injury “by demonstrating the existence of a colorable
11 First Amendment claim.” *Canyon Ridge Baptist Church, Inc. v. City of San Diego*, No.
12 05CV2313 R (CAB), 2006 WL 8455354, at *9 (S.D. Cal. June 15, 2006) (quoting
13 *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002); 11A
14 CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. CIV. § 2948.1 (3d ed.) (“When
15 an alleged deprivation of a constitutional right is involved, such as the right to free
16 speech or freedom of religion, most courts hold that no further showing of irreparable
17 injury is necessary.”) (footnotes omitted).

18 Without an injunction preventing Defendants from further enforcing the
19 Orders, Plaintiffs will suffer irreparable harm to their fundamental constitutional
20 rights. And because of the threat of civil and criminal penalties, Plaintiffs cannot
21 engage in core religious worship, a quintessential irreparable injury.

22 These irreparable injuries cannot adequately be compensated by damages or any
23 other remedy available at law. Thus, Plaintiffs are suffering irreparable injury.

24 **3. The Balance of Hardships Tips Sharply in Plaintiffs’ Favor.**

25 The balance of hardships tips overwhelming in favor of Plaintiffs. Here, the
26 threatened injury to Plaintiffs is weighty—the loss of constitutional rights and the
27 inability to practice their faith. Plaintiffs have shown that leaving those Orders in place
28 for even a brief period “would substantially chill the exercise of fragile and

1 constitutionally fundamental rights,” and thereby constitute an intolerable hardship to
 2 Plaintiffs. *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005,
 3 1012 (N.D. Cal. 2007).

4 By contrast, the cost of a temporary restraining order to the Government is
 5 negligible. In fact, Defendants have the authority to adopt, at least on an interim basis,
 6 a more narrowly crafted set of equally applied provisions that enable the government
 7 to achieve any legitimate ends without unjustifiably invading First and Fourteenth
 8 Amendment freedoms. In addition, Defendants will suffer no legitimate harm by
 9 accommodating Plaintiffs’ exercise of fundamental rights in the same manner
 10 Defendants are accommodating millions of others engaged in secular activities. The
 11 Constitution demands no less.

12 **4. A Temporary Restraining Order is in the Public Interest**

13 A temporary restraining order is in the public interest. As the Ninth Circuit has
 14 “consistently recognized,” there is a “significant public interest in upholding First
 15 Amendment principles.” *Doe v. Harris*, 772 F.3d 563, 683 (9th Cir. 2014). As discussed
 16 above, Plaintiffs’ core constitutional rights to free exercise of religion, equal
 17 protection, and due process will remain in jeopardy so long as Defendants remain free
 18 to enforce their Orders. Thus, the public interest favors an injunction. *Maryville Baptist*
 19 *Church*, 2020 WL 2111316, at *4 (“As for the public interest, treatment of similarly
 20 situated entities in comparable ways serves public health interests at the same time it
 21 preserves bedrock free-exercise guarantees.”); *First Baptist Church*, 2020 WL 1910021,
 22 at *8 (“The public interest is furthered by preventing the violation of a party’s
 23 constitutional rights.”); *On Fire Christian Ctr.*, 2020 WL 1820249, at *10 (“[T]he
 24 public has a profound interest in men and women of faith worshipping together this
 25 Easter in a manner consistent with their conscience.”); *Tabernacle Baptist Church*,
 26 2020 WL 2305307, at *5 (“[T]he public interest favors the enjoinder of a
 27 constitutional violation”).

28 ///

1 **5. The Court Should Dispense with Any Bond Requirement.**

2 Finally, Rule 65(c) of the Federal Rules of Civil Procedure provides that a
 3 temporary restraining order or preliminary injunction may be issued “only if the
 4 movant gives security in an amount that the court considers proper to pay the costs
 5 and damages sustained by any party found to have been wrongfully enjoined or
 6 restrained.” Fed. R. Civ. P. 65(c). Even so, the Court has discretion over whether any
 7 security is required and, if so, the amount. *See, e.g., Jorgensen v. Cassidy*, 320 F.3d
 8 906, 919 (9th Cir. 2003). The Ninth Circuit has “long-standing precedent that
 9 requiring nominal bonds is perfectly proper in public interest litigation,” especially
 10 “where requiring security would effectively deny access to judicial review.” *Save Our*
 11 *Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (citing *People of State of*
 12 *Cal. ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d 1319, 1325–26 (9th
 13 Cir. 1985); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975)).

14 Plaintiffs request that the Court waive any bond requirement, because enjoining
 15 Defendants from unconstitutionally enforcing the orders as to religious activities will not
 16 financially affect Defendants, who already categorically exempt specified non-religious
 17 activities from compliance. A bond would, however, be burdensome on already
 18 burdened Plaintiffs under these circumstances. *See, e.g., Bible Club v. Placentia-Yorba*
 19 *Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1302 n.6 (C.D. Cal. 2008) (waiving requirement
 20 of student group to post a bond where case involved “the probable violation of [the
 21 club’s] First Amendment rights” and minimal damages to the District of issuing
 22 injunction); *Doctor John’s, Inc. v. Sioux City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa
 23 2004) (“requiring a bond to issue before enjoining potentially unconstitutional conduct
 24 by a governmental entity simply seems inappropriate, because the rights potentially
 25 impinged by the governmental entity’s actions are of such gravity that protection of
 26 those rights should not be contingent upon an ability to pay.”).

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CONCLUSION


As stated by Attorney General Barr, “ Many policies that would be unthinkable in regular times have become commonplace in recent weeks, and we do not want to unduly interfere with the important efforts of state and local officials to protect the public. But the Constitution is not suspended in times of crisis. We must therefore be vigilant to ensure its protections are preserved, at the same time that the public is protected.” Mem. for the Ass. Att’y Gen. for Civ. Rights (Trissell Decl., Ex. L). Thus, Plaintiffs respectfully request that the Court grant a temporary restraining order before May 16, 2020, and issue an order to show cause re: preliminary injunction, as follows:

- Defendants, their agents, employees, and successors in office, are restrained and enjoined from enforcing, trying to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on Plaintiffs’ engagement in religious services, practices, or activities at which the County of San Diego’s Social Distancing and Sanitation Protocol and Safe Reopening Plan is being followed.

Respectfully submitted,

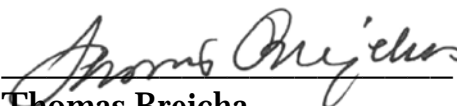
LiMANDRI & JONNA LLP

Dated: May 11, 2020

By: 
 Charles S. LiMandri
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 Attorneys for Plaintiffs

THOMAS MORE SOCIETY


Dated: May 11, 2020

By: 
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15 Attorneys for Plaintiff

17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 SOUTH BAY UNITED PENTECOSTAL
20 CHURCH, a California non-profit
21 corporation; and BISHOP ARTHUR
22 HODGES III, an individual,

23 Plaintiffs,

24 v.

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

27 Defendants.
28

Case No. 3:20-cv-00865-AJB-MDD

**Declaration of Bishop Arthur
Hodges III in Support of
Application for a Temporary
Restraining Order, and Order to
Show Cause Re: Preliminary
Injunction**

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

2 1. I, Bishop Arthur Hodges, am a plaintiff in this action. I am a resident of
3 San Diego County, California. I serve as Senior Pastor of South Bay Pentecostal
4 Church. I also serve as Superintendent for the SoCal District of the United
5 Pentecostal Church International. I submit this declaration in support of Plaintiffs'
6 Application for a Temporary Restraining Order, and Order to Show Cause Re:
7 Preliminary Injunction in my capacity as an individual and in my capacity as Senior
8 Pastor of South Bay United Pentecostal Church. I have personal knowledge of the
9 matters set forth below, and could and would testify competently to them if called
10 upon to do so.

11 **Background and Ministry**

12 2. I have served as senior Pastor of South Bay United Pentecostal Church
13 for thirty-five (35) years. I also serve as District Superintendent of the United
14 Pentecostal Church International. As Bishop, I oversee more than two-hundred (200)
15 pastors and ministers, representing more than one-hundred (100) churches across
16 Southern California.

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

22 4. My vocation was settled from an early age. I am the son of a Pentecostal
23 Pastor. My father repeatedly built churches from scratch, establishing the community
24 and moving on to repeat the same process in another town.

25 5. At the age of ten (10), I felt God calling me to the same ministry.
26 However, sensing the labors of my Father, who was tasked with raising a family,
27 maintaining his electrician business, and serving as a Pastor all at the same time, I
28 understood the tremendous sacrifice that pastors are expected to make. At that age, I

1 was frightened by the burden. As such, I was reluctant to accept God’s call.

2 6. When I was twelve (12), I attended a youth class. The teacher of that
3 particular class was very passionate about the power of prayer. Frequently, he would
4 end those classes in prayer meetings. At one prayer meeting, I heard God asking me,
5 “Are you willing to be my preacher? Will you be my minister?” In that moment, I
6 said yes, and the fear of my father’s burden finally left me. However, it would be a
7 number of years before I would make good on that promise.

8 7. Upon graduating from high school, I believed I would become an airline
9 pilot. However, my father requested that I honor his sacrifices in raising me and
10 asked me to give Bible College a chance. Out of a sense of filial duty, I enrolled at the
11 Apostolic Bible Institute in St. Paul, Minnesota. While at the Institute, God’s call
12 became too loud to ignore. With a missionary’s zeal, I threw myself into full-time
13 ministry. I began preaching at youth camps, conferences, and other venues, traveling
14 from city to city and state to state, sharing God’s Word with all who would open their
15 hearts to listen.

16 8. Two years later, my father invited me to serve as Assistant Pastor at
17 South Bay Pentecostal Church. Sensing that life on the road was no place to grow a
18 family, and with my wife pregnant with our first child, I agreed to accept the position.
19 The passage of time brought change, and my father once more felt the call to move on
20 to a new church. In his stead, I was unanimously voted to take his place at South Bay,
21 where I have served ever since.

22 9. I am a sincere, strong believer that the Bible is the infallible and
23 immutable word of God. This belief is one that I share with South Bay Pentecostal
24 Church. We believe that there is one God—the creator of all. We practice as best we
25 know how and can according to our abilities and understanding of Scripture. “Not
26 forsaking the assembling of ourselves together, as the manner of some is; but
27 exhorting one another: and so much the more, as ye see the day approaching.”
28 (Hebrews 10:25)

1 10. Our model is the New Testament church founded and described in the
2 book of the Acts of the Apostles: “And when the day of Pentecost was fully come,
3 they were *all with one accord in one place*” (Acts 2:1) (emphasis added) We believe
4 that “all” being gathered in “one place” is fundamental in order to fulfill Christ’s
5 final charge that “you will be my witnesses.” (Acts 1:8) Thus, at the Church’s very
6 beginning, we believe that the foundational function of the church, all gathering
7 together with one accord, was established.

8 11. The Book of Acts, which chronicles the founding of the Church, uses
9 the word “together” thirty-one (31) times, thus providing thirty-one reasons for the
10 church to come together with one accord. Being “together” spiritually and physically
11 is key in our preaching, teaching, and worship practice. This experience of
12 worshipping together occurs *both* in the home **and** in the communal setting,
13 “continuing daily with one accord **in the temple**, and breaking bread **from house to**
14 **house.**” (Acts 2:46–47) (emphasis added)

15 12. In observance of this sacred charge and sincerely held religious belief, we
16 hold between three and five services each Sunday. The average attendance at some of
17 these services lies between two-hundred (200) and three-hundred (300) congregants.
18 Our sanctuary can hold up to six-hundred (600) people.

19 13. Our services focus on the scriptural charge to be “together”—both
20 spiritually and physically. Services begin with Bible classes spread across different
21 ages and groups. Each class may have between ten (10) and one-hundred (100)
22 participants. When these classes conclude, congregants gather together with one
23 accord for praise and worship. Those with special needs or sickness come forward
24 and stand around the altar, where hands are laid upon them and they are then
25 anointed. This sacrament observes the Scriptural charge to “let them pray over him,
26 anointing him with oil in the name of the LORD.” (James 5:14)

27 14. We believe that the act of laying on hands also assists in conferring, in a
28 real sense, the gift of the Holy Ghost: “And when Paul had laid his hands on them,

1 the Holy Ghost came on them.” (Acts 19:6) The service concludes with preaching
2 followed by a challenge to physical action, where the congregation is challenged to
3 approach the altar to “come believing, come praying.” As mandated by Scripture,
4 the service concludes with fellowship both inside and outside the sanctuary: “And
5 they continued steadfastly in the apostles’ doctrine and fellowship, and in the
6 breaking of bread, and in prayers.” (Acts 2:42)

7 15. We also perform baptisms, funerals, weddings, and other religious
8 ceremonies.

9 16. We believe Scripture exhorts us to “[r]epent, and be baptized every one
10 of you in the name of Jesus Christ for the remission of sins, and ye shall receive the
11 gift of the Holy Ghost.” (Acts 2:38) We believe this sacrament of “new birth”
12 cannot be performed on one’s own, or by staying at home. One may repent on their
13 own, but they *cannot baptize themselves*. We practice the sacrament of baptism by
14 immersion in water on a weekly and/or daily basis, based on the need or request of a
15 candidate. We believe there is no justifiable reason for postponing the sacrament of
16 baptism, as it is a necessary part of salvation.

17 17. Our congregation is multi-racial and represents a cross-section of
18 society, from rich to poor and encompassing people of all ages. Our congregation also
19 includes members and visitors who run the gamut of essential workers. These
20 essential workers and service providers receive spiritual support, comfort, guidance,
21 and shelter from our ministry.

22 **The Impact of the COVID-19 Orders**

23 18. Since Governor Newsom’s, the County of San Diego’s, and the City of
24 San Diego’s orders prohibiting physical religious assembly were put in place (the
25 “Orders”), our ability to carry out our ministry has been dramatically curtailed. I
26 have been forced to curtail my ministry, as well as that of my church, despite the fact
27 that I have neither experienced symptoms of nor been diagnosed with COVID-19.

28 19. These orders forbid the assembly required to come together with one

1 accord. These orders forbid baptism by immersion, gathering around the altar, and
2 any form of “being together” that is *both* physical and spiritual.

3 20. “Zoom Meetings” and other tele-conferencing applications are
4 inadequate substitutes as they curtail a minister’s ability to lay hands upon a
5 congregant or perform a baptism. They also curtail our congregation’s ability to
6 approach the altar, which is central to our experience of faith.

7 21. As a result of the Orders, I am prohibited from holding the services
8 mandated by Scripture. These include the important milestone services that mark life
9 events and even the end of a life.

10 22. It is particularly heartbreaking and tragic for a congregant to lose a
11 parent or child and not be able to gather with one accord with their family of faith.
12 Because the Orders prohibit religious assembly, funerals have been postponed and/or
13 dramatically curtailed. As a result, I am unable to hold any funerals in our sanctuary,
14 and members of my congregation are left to nurse their heartbreak in silence or
15 through inadequate substitutes.

16 23. One congregant’s service was held in a funeral home that limited
17 attendees to ten people and imposed social distancing measures, which resulted in
18 much of the decedent’s family being denied participation. Funeral personnel filmed
19 the entire proceeding out of concern for liability should one of the participants fall ill.
20 Such a service is a poor substitute to allowing the deceased’s extended family of faith
21 gather to offer comfort, support, and verbal statements of faith in the salvation of the
22 departed.

23 **Ensuring Social Distancing**

24 24. I desire to hold services at the South Bay Pentecostal Church in a
25 manner that properly protects my congregants so that they may observe the
26 inviolable precepts of Scripture and encourage and comfort one another during these
27 troubling times of the COVID-19 outbreak. My congregation needs to connect with
28 one another in order to receive the hope and encouragement they need to heal and

1 grow in their faith and in order to observe the Scriptural requirement of gathering
2 together with one accord.

3 25. The Orders providing an outright ban on religious services are
4 overbroad and unnecessary because Sunday services, baptisms, and funerals may be
5 held in a manner consistent with the social distancing guidelines. If restaurants, auto
6 mechanics, and marijuana dispensaries are capable of following these guidelines, my
7 congregation is certainly capable. Governor Newsom has made clear that his order is
8 merely a floor, and that regional autonomy permits the imposition of stricter
9 standards. Thus, businesses in San Diego County are practically guided by the
10 County’s Social Distancing and Sanitation Protocol—which appears to follow quite
11 closely the CDC guidelines.

12 26. As the below photo demonstrates, South Bay Pentecostal Church
13 possesses a large sanctuary that provides ample room to accommodate the six (6) feet
14 of social distancing required by the County and CDC requirements. Moreover,
15 should the amount of congregants threaten to overwhelm the social distancing
16 guidelines, additional services can be added to accommodate smaller gatherings that
17 would satisfy those guidelines.



25
26 27. In addition, we can integrate masks, gloves, screens, veils, and other
27 screening mechanisms in order to protect congregants and inhibit the spread of
28 COVID-19 during all services, including Sunday worship, baptisms, and funerals.

1 Our full-immersion baptismal font currently uses an ultraviolet light water filtration
2 system to kill pathogens. To further secure against infection. we will also use virus-
3 killing chlorine in a concentration similar as that used in public swimming pools.
4 Furthermore, we will encourage anyone uncomfortable with gathering during the
5 pandemic to stay at home. We will also require that anyone who is sick or has
6 symptoms to stay at home.

7 28. In other words, we can and will abide by the County's Social Distancing
8 and Sanitation Protocol just like any other organization.

9 29. These services are essential for the spiritual health of the congregation
10 so that the congregants can exhort one another and the will of God during these
11 difficult times.

12 30. We have previously demonstrated our ability to adopt and enforce
13 suitable guidelines for social distancing practices through our work as what may be
14 the largest food distributor to needy people in the South Bay region of San Diego
15 County. Since the closure orders were placed, we worked with the Chula Vista Police
16 Department to develop a drive-through food distribution system so that hundreds of
17 cars may drive into and around the Church parking lot. Volunteers are provided
18 masks and gloves and deliver groceries, contact-free, directly into each driver's trunk
19 or cargo area. During any given week, we distribute between three (3) and twelve (12)
20 tons of food. We have also been publicly fêted for our efforts by the Mayor of Chula
21 Vista.

22 31. If we are capable of demonstrating and implementing proper social
23 distance protocols for the purposes of food distribution, our community is clearly
24 capable of demonstrating and implementing similar protocols when engaging in our
25 Scripturally mandated worship practices.

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I declare until penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed on May 6, 2020.

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Bishop Arthur Hodges

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17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 SOUTH BAY UNITED PENTECOSTAL
20 CHURCH, a California non-profit
21 corporation; and BISHOP ARTHUR
22 HODGES III, an individual,

23 Plaintiffs,

24 v.

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

27 Defendants.
28

Case No. 3:20-cv-00865-AJB-MDD

**Declaration of George Delgado,
M.D. in Support of Application
for a Temporary Restraining
Order, and Order to Show
Cause Re: Preliminary
Injunction**

1 I, George Delgado, M.D., declare and state as follows:

2 1. I am a physician, licensed by the Medical Board of the State of California
3 since 1989. I submit this declaration in support of Plaintiffs' Application for a
4 Temporary Restraining Order, and Order to Show Cause Re: Preliminary Injunction.
5 I have personal knowledge of the matters set forth below, and could and would testify
6 competently to them if called upon to do so.

7 **Background**

8 2. I graduated from St. Mary's College of California with a Bachelor of
9 Science degree, summa cum laude and received my Doctor of Medicine degree from
10 the University of California, Davis. I completed my family residency at Santa Monica
11 Hospital/UCLA and I am board certified in family medicine, hospice, and palliative
12 medicine.

13 3. Since 2005, I have been the medical director of a family medical group.
14 Additionally, I am the chief medical officer of a large hospice.

15 4. Post-residency I have practiced medicine in the State of California for 29
16 years. During that time, I have treated many people with infectious diseases,
17 including viral illnesses such as influenza, which tend to occur in epidemics. I have
18 been intimately involved in planning for the current coronavirus disease 2019
19 (COVID-19) pandemic, caused by the severe acute respiratory syndrome coronavirus
20 2 (SARS-CoV-2) for my family medical group and hospice.

21 **Monte Carlo Simulation of COVID-19 Infection Data**

22 5. While planning for the pandemic, I have been providing medical support
23 and direction to a COVID-19 planning group headed by William Goyette, an
24 aerospace engineer. Mr. Goyette has long experience with using Monte Carlo
25 simulations in order to solve complex problems in the areas of physics and electrical
26 engineering. He noticed that most of the models that were being used to predict the
27 pandemic's course were close form models that essentially fit data to a curve. The
28 Monte Carlo model has proven to be more accurate than the models more commonly

1 being used to predict the impact of the COVID-19 pandemic.

2 6. It is clear that due to mitigation measures carried throughout California,
3 the trajectory of the COVID-19 pandemic has been altered; the “curve has been
4 flattened.” Mitigation measures, like any medical treatment, have untoward
5 consequences, some foreseeable, some not. When they are imprecise, they can lead
6 to civil liberty infringements. Furthermore, the “treatment” that got us to where we
7 are now, is not the “treatment” that is indicated for us now.

8 7. In the clinical practice of medicine, we acknowledge that people have
9 spiritual, psychological and physical dimensions. We know that spiritual and
10 psychological stress and trauma can lead to physical problems, including immune
11 system dysfunction. Arbitrarily declaring religious services to be “non-essential,”
12 besides being unconstitutional, also carries with it certain profound spiritual and
13 psychological risks that, ironically, could actually lead to an increase in mortality from
14 COVID-19 by negatively impacting immune function and by destabilizing the support
15 systems of vulnerable people.

16 8. Different data sets related to the pandemic demonstrate similar curves
17 when graphed over time. The peaks of those curves often follow a predictable
18 sequence, especially when testing is not readily available for a large percentage of the
19 population. Actual cases will peak first, followed by positive tests (in the case of
20 COVID-19, PCR viral RNA tests), followed by hospitalizations, followed by intensive
21 care unit (ICU) admissions, followed by deaths and recovery.

22 9. It is important to keep in mind that positive tests can be misleading
23 when you are still testing relatively low numbers of a population, i.e., you are
24 “catching up.” The more tests performed, the greater the increase in new cases that
25 will be recorded.

26 10. Hospitalizations and deaths are both lagging indicators. In fact, deaths
27 reflect infections that started approximately three weeks prior to the death. Except in
28 certain geographic pockets where flare-ups may occur, level or decreasing

1 hospitalizations and death rates are very reassuring indicators that we have reached a
2 plateau or are seeing a decrease in the number of new infections.

3 11. In California, the statistics support the flattening of the curve.
4 Hospitalizations have remained at a relatively steady level and ICU admissions have
5 trended downward. Deaths have been at a plateau since April 6, with the daily death
6 count from April 6 to May 2 ranging from 31 to 115 per day. Only one of those days
7 had 100 or more deaths. Eight of those days had counts less than 50. Again, deaths
8 are the last lagging indicator.

9 12. Los Angeles County has reported about 1,200 deaths (out of California's
10 approximate total of 2,200). There too, however, the curve of new deaths has
11 flattened, similar to the California curve. The Monte Carlo model predicts that total
12 deaths in Los Angeles County will be approximately 1,900, for this year.

13 13. The measure R_0 ("R naught") provides an indication of how many
14 additional persons an infected person can infect. When R_0 drops below one, an
15 outbreak loses steam and begins to subside. Our model shows that in Los Angeles
16 County R_0 decreased to less than one in early April.

17 **Resumption of Religious Services Will**
18 **Not Jeopardize Public Health**

19 14. I am confident that a resumption of religious services can take place in a
20 manner that does not jeopardize public health. In fact, I feel that going to one's
21 church, synagogue or mosque should be much safer than going to the grocery store.

22 15. One could easily compare an average grocery store, which serves 1,000
23 customers per day, to a house of worship in terms of risk of contagion. Even with
24 planned flow of foot traffic, the movement of people in the grocery store remains
25 relatively uncontrolled. The aisles are not designed to allow six-foot social distancing.
26 People touch merchandise that they will never buy. By the time a person puts an item
27 in his or her cart, it may have been touched by several, if not hundreds of people in
28 the three previous days (the coronavirus can survive up to three days on smooth

1 surfaces). The cart may have had its handle sanitized but the carriage itself likely was
2 not. Next, the items are placed on a conveyer belt which has contacted hundreds of
3 items that others have touched. The clerk wears gloves but does not change gloves
4 between customers. He touches nearly every item as well as money.

5 16. The house of worship, on the other hand will likely have far fewer than
6 1,000 attendees and services may even be held outdoors. The participants will be
7 stationary for all or most of their services and their movements can be very
8 controlled, planned, and prescribed, as opposed to the uncontrolled movements in
9 grocery stores. Worshipers will not be touching multiple items. There will be time
10 after each service to thoroughly clean the chairs or pews that they do touch.

11 17. We can calculate the risk of contagion at the house of worship if the
12 guidelines listed below are followed, compared to a grocery store. A relative value
13 greater than 1 makes the house of worship riskier, while a relative risk less than 1
14 makes the house of worship safer.

15 18. *Being in the same building with others at any one time: relative risk is 4
16 (100 in the house of worship 25 in grocery store)

17 19. *People touching multiple objects: relative risk is 0.25. People touch far
18 fewer things in the house of worship; 1,000 people per day touch many things in the
19 grocery store. Chairs and pews can be sanitized after services. It is impracticable, if
20 not impossible, to sanitize all items in a store.

21 20. *Close contact with others: relative risk is 0.25. Worshipers are
22 stationary and socially distanced. They enter and exit in a controlled, spaced manner.
23 Shoppers move about as they wish, even if flow is one way.

24 21. Therefore, the calculation is: **Risk in House of Worship = Risk in**
25 **Grocery Store x 4 x 0.25 x 0.25 = 0.25**, which is less than 1.

26 22. **Therefore, the calculated risk of contracting COVID-19 at the house**
27 **of worship is 0.25 or 25% the risk at the grocery store**, and no one is arguing that
28 going to the grocery store is not safe.

1 23. The following commonsense recommendations will facilitate a safe
2 return to meaningful, spiritually rich religious services for the millions of Californians
3 who cherish their religion and do not deem its practice unessential:

4 A. Have a questionnaire that the attendees self-administer before entering.

5 Any who have symptoms of COVID-19 or contact with someone who is
6 infected should be told not to enter.

7 B. All who enter the house of worship should sanitize their hands.

8 C. More services should be offered to allow limiting congregation sizes. There
9 should be no arbitrary limit on congregation size, however, as long as six-
10 foot social distancing can be maintained.

11 D. Shorter sermons and shorter services will allow clergy to offer more
12 services while maintaining their spiritual and physical stamina.

13 E. If feasible, outdoor services should be offered. Alternatively, houses of
14 worship should be well-ventilated, with many doors and windows open.
15 There is less chance of contagion in well-ventilated areas.

16 F. During services, people should sit together as families, with six feet
17 between families. Only allow seating in every other pew or row, leading to
18 six-foot spacing.

19 G. Face coverings or face masks should be worn by attendees. The clergy
20 person, being greater than six feet away from congregants, need not wear a
21 face covering.

22 H. No singing by the assembly should be allowed, as singing can aerosolize the
23 virus. Chanting by the minister should be allowed.

24 I. Where communion is offered, lines can be spaced with families at six-foot
25 intervals, just like in the supermarket.

26 J. The minister who distributes communion should sanitize his or her hands
27 and take great care not to touch any recipient's mouth or hand. If an
28 inadvertent contact occurs, the minister should re-sanitize the hands,

1 immediately.

2 K. No hugging, kiss of peace, hand shaking or hand holding should be
3 allowed.

4 L. Worship aids and prayers should be projected, if possible. Reusable prayer
5 books should be removed from the building.

6 M. Foot traffic entering and exiting the worship area should be designed as a
7 one-way flow loop.

8 N. Entrance should be in orderly stages, from front to back, in order to avoid
9 close physical contact between worshipers.

10 O. Likewise, egress should be row by row, beginning with the row closest to
11 the exit door.

12 P. After each service, chairs, benches and pews should be sanitized.

13 I declare under penalty of perjury under the laws of the United States and the
14 State of California that the foregoing is true and correct. Executed on May 6, 2020.

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16 _____
17 George Delgado, M.D.

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