DOCKET NO. 20-55533

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTH BAY UNITED PENTECOSTAL CHURCH, et al.,
Plaintiffs/Appellants

v.

GAVIN NEWSOM, in his official capacity as the Governor of California, et al.,
Defendants/Appellees

On Appeal From The United States District Court,
For The Southern District of California
Case No. 20-cv-00865-BAS-AHG,
Hon. Cynthia A. Bashant, District Judge

BRIEF OF COUNTY DEFENDANTS/APPELLEES AND JOINDER IN STATE DEFENDANTS' BRIEF

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In Their Official Capacities

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JOINDER

Please take notice that Defendants/Appellees—County Public Health Officer, Dr. Wilma J. Wooten; San Diego County Sheriff William D. Gore; and County Emergency Services Director Helen Robbins-Meyer, all sued in their official capacities (the "County Defendants")—hereby join the brief filed by the State Defendants. The County Defendants agree that the district court's order should be affirmed for all the reasons stated therein.

ADDITIONAL ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST THE COUNTY DEFENDANTS ARE MOOT AND MISDIRECTED

A. Plaintiffs' Claims Are Moot.

Plaintiffs filed their Application for a Temporary Restraining Order on May 11, 2020. They challenged Governor Newsom's May 7, 2020 "Resilience Roadmap," and the County's May 10, 2020 Order implementing it. *See* 2 ER 279, 282.

The County's Order has since been superseded. On May 25, 2020, the Governor issued his Guidance regarding Places of Worship and Providers of Religious Services and Cultural Ceremonies, which authorized reopening, subject to attendance caps. *See* State Defendants' Motion for Judicial Notice (hereinafter, "State MJN."). On May 26, 2020, the County adopted the Guidance. Specifically, the County's Order of the Health Officer and Emergency Regulations (Effective

May 27, 2020) provides that "religious services and cultural ceremonial activities may be conducted in conformance with the State Guidance," provided that they also prepare and post a "Safe Reopening Plan." *See* County Defendants' Motion for Judicial Notice (hereafter, "County MJN"), Exh. 1, ¶¶ 11, 12, 14.

Churches were permitted to reopen immediately, and South Bay United Pentecostal began holding in-person services – which is precisely what their lawsuit sought to achieve. *See* 2 ER 280 ("Communal worship and ministry are at the heart of Plaintiffs' religious beliefs and practices."). Their action is thus moot. *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001) ("'[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'").

Plaintiffs argue that the May 26, 2020 order is still too restrictive, as they wish to hold services that exceed the numerical caps.[1] But even if Plaintiffs "'may have some residual claim under the new [legal] framework,'" the Court should dismiss this appeal and remand to the district court to permit Plaintiffs, should they so choose, to amend their complaint to include allegations about the new

[1] Notably, plaintiffs are now free to hold services of any size – it is only *indoor* activities that are subject to numerical caps. On June 12, 2020, the State released updated guidelines to remove numerical limits on outdoor worship services. *See* State MJN. The County's public health order conforms to the less restrictive state rules. *See* County MJN, Exh. 2, ¶¶ 12, 14.

guidelines so that the record may be developed more fully." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (*per curiam*), (quoting *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 482 (1990). Here, the record does not address the numerical caps; their constitutionality was not litigated below; nor has it been decided by the district court. Dismissal and remand is warranted.

B. The County Representatives Are Not the Proper Defendants.

Plaintiffs' request for injunctive relief against the County Defendants is particularly inappropriate. The Governor asserted sole authority to decide when the State would move into new stages of its Resiliency Roadmap, and thus when his stay-at-home order would be modified to permit in-person religious services and similar secular gatherings. Plaintiffs themselves contend that the County has no authority to relax, for residents of San Diego, the statewide requirements imposed by the Governor:

> The County of San Diego has issued orders alongside California, **but Executive Order N-33-20 is the floor.** *See* 3 ER 589-97. San Diego may issue more restrictive orders than the Governor's, or simply issue guidance on how to follow Executive Order N-33-20 within San Diego.

AOB 4 (emphasis supplied). *See also* 3 ER 500 (FAC ¶ 35).

Moreover, in his May 25, 2020 Guidance regarding Places of Worship and Providers of Religious Services and Cultural Ceremonies, the Governor again asserted sole authority to set the cap, and did not authorize municipalities to set

higher caps. *See* State MJN ("Places of worship must therefore limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower. This limitation will be in effect for the first 21 days of a county public health department's approval of religious services and cultural ceremonies activities at places of worship within their jurisdiction."). The County has adopted the Guidance, and has not imposed any greater restrictions. Specifically, the County's Order of the Health Officer and Emergency Regulations (Effective May 27, 2020) provides that "religious services and cultural ceremonial activities may be conducted in conformance with the State Guidance," provided that they also prepare and post a "Safe Reopening Plan." *See* County MJN, Exh. 1, ¶¶ 11, 12, 14.

Moreover, the County formally requested the Governor's authorization to open religious facilities "more broadly – beyond the 25% or 100 person cap . . . ." *See* County MJN, Exh. 3 (Letter from Greg Cox, Chairman, San Diego County Board of Supervisors (June 3, 2020)).[2] As of this writing, the County has not received a response.

Plaintiffs' request for injunctive relief should thus be directed at the Governor, who asserted sole authority to determine when in-person religious services would be permitted, and to impose a cap on attendance at such services. The County Defendants need not and should not be enjoined.

[2] Available at bit.ly/376cChq, cited in AOB at p. 58, n. 34.

II. PLAINTIFFS' CLAIMS AGAINST THE COUNTY ARE FACTUALLY AND LEGALLY FLAWED

A. Plaintiffs Rely on an Elementary Fallacy to Trivialize the Risk of COVID-19 in San Diego County.

Plaintiffs claim that "the probability of dying of COVID-19," as of May 2, 2020, was approximately 5.6 out of 100,000 in California, and 5.2 out of 100,000 in San Diego County. AOB 5. These rates, plaintiffs contend, are much lower than the rates for heart disease, accidents, diabetes, and suicide. AOB 6.

But the fact that the death rate is comparatively low, following an extended period of aggressive restrictions, does not mean that concerns about the virus were misplaced. Nor does it mean that restrictions on gatherings in churches were unwarranted. It means that the hard decisions made by public health officials and the many sacrifices made by County residents paid off, slowed the spread, and saved lives.

When seatbelt legislation reduced accident fatalities, no serious observers argued that the lower figures meant that the legislation was ill-conceived. When age restrictions on tobacco reduced youth addiction rates, no serious observers argued that the reduction proved the age restrictions unnecessary. Likewise, a comparatively low death rate during a period of social distancing does not mean that social distancing has been proved unnecessary. Rather, a low death rate

confirms that the restrictions helped mitigate against outcomes that could have been far, far worse.

Moreover, plaintiffs' argument has not aged well. The County of San Diego, in recent days, has experienced a significant increase in infections. It reached record case numbers, and the percentage of positive COVID-19 tests has increased too. *See* County MJN, Exh. 4.[3] The County has adopted a multi-factored set of triggers for modification of its health orders (*see* County MJN, Exh. 5),[4] and continually monitors the local situation.

Only time will tell whether this week's spikes will subside, plateau, or reach new heights. But the fluidity and volatility of the pandemic's spread confirms that local officials need broad discretion to craft appropriate solutions, based on expert analysis of the evidence as it unfolds from day to day. As Justice Roberts explained in response to plaintiffs' application in this case:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an

[3] Available at https://tinyurl.com/y7qwkra6 (last visited June 26, 2020).

[4] Available at https://tinyurl.com/y7z8coha (last visited June 26, 2020).

> "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

South Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

B. Plaintiffs' Assurance that They Will Adhere to the County's Social Distancing Protocols Is Not Sufficient to Satisfy Public Health Concerns.

Plaintiffs claim they will abide by the County's Social Distancing and Sanitation Protocol and Safe Reopening Plan. AOB 21. *See also* 2 ER 312 ("[W]e can and will abide by the County's Social Distancing and Sanitation Protocol just like any other organization."). And the injunctive relief they requested specifically incorporates the Protocol. *See* 2 ER 35, 269, 303 (seeking order enjoining "Defendants . . . from enforcing . . . any prohibition on Plaintiffs' engagement in religious services . . . at which the County of San Diego's Social Distancing and Sanitation Protocol and Safe Reopening Plan is being followed."). *See also* 3 ER 530 (same). In plaintiffs' view, the Bishop's promise to adhere to the County's Protocol means "he is not asking for special treatment; he is only asking for equal treatment." AOB 55-56.

This argument misunderstands the nature and purpose of the County's public health protocols. Specifically, plaintiffs' argument assumes that the County's Social Distancing and Sanitation Protocol (hereinafter, the "Protocol") (3 ER 599-

601) was designed to address public health concerns related to any organized gathering, no matter the context. In plaintiffs' view, if adherence to the Protocol by a local business is sufficiently protective of public health, then adherence to the Protocol by a church must be too.

In reality, the Social Distancing and Sanitation Protocol was not designed to be sufficient to regulate indoor public gatherings, in which groups of people gather in a singular and undifferentiated space. There was no need for such regulation at the time the Protocol became effective (*i.e.*, April 7, 2020), because such gatherings were prohibited. Indeed, it was not until three weeks after the effective date of the Protocol that the Governor even announced his reopening plan, under which indoor public gatherings—whether secular or religious—would be phased in over time.

The plain language of the Protocol, too, demonstrates that it does not contemplate indoor public gatherings. Rather, it was designed to protect employees and customers of local businesses. It requires "desks or individual work stations" to be separated by at least six feet. 3 ER 599. It requires disinfecting of "shopping carts and baskets," as well as "payment portals, pens, and styluses." 3 ER 601. And most tellingly, it makes it mandatory to minimize the number of persons present, by requiring that "everyone who can carry out their work duties from home has been directed to do so." 3 ER 599.

Moreover, the Protocol is not designed to account for the unique risks associated with large-scale indoor gatherings involving collective singing and/or recitation, especially when such gatherings are for sustained periods. As the Seventh Circuit explained, such gatherings are fundamentally different than ordinary business activity:

> The Executive Order's temporary numerical restrictions on public gatherings apply not only to worship services but also the most comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus. Worship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods.

Elim Romanian Pentecostal Church v. Pritzker, 2020 WL 2517093 (7th Cir. May 16, 2020) (Easterbrook, C.J., Kanne, C.J., Hamilton, C.J.).

Plaintiffs' request for injunctive relief thus rests on a misunderstanding of the County's Protocol. When combined with the Governor's caps on attendance, social distancing measures and sanitation becomes a useful tool for protecting public health in the context of indoor church services. But the Protocol was never intended to be sufficient, standing alone, to regulate indoor public gatherings.

C. Plaintiffs' Selective Enforcement Theory Is Procedurally Improper and Substantively Meritless.

The County defendants join in the State Defendants' arguments regarding plaintiffs' selective enforcement theory. In particular, the County objects to plaintiffs' disregard of the most basic rules of appellate procedure. Plaintiffs never pursued a selective enforcement theory below, and the district court never ruled on it. Accordingly, plaintiffs inappropriately ask this Court to serve as a factfinder, and to decide the issue in the first instance.

Plaintiffs likewise ignore the fundamental canon of appellate practice – that "only the court may supplement the record." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). Instead, plaintiffs rely heavily on unauthenticated tweets, photographs and videos, and even cite a newspaper's opinion section. They treat the judicial notice process as an unnecessary nicety, and instead ask this Court to decide the case based on untested hearsay, the bulk of which is outside the record. This violates the most basic rules of appellate practice, and this Court has sanctioned similar efforts to unilaterally "supplement" the record:

> Only the court may supplement the record. "[It is a] basic tenet of appellate jurisprudence ... that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below." *Tonry v. Sec. Experts, Inc.,* 20 F.3d 967, 974 (9th Cir.1994). Litigants should proceed by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question.

Lowry, 329 F.3d at 1024-25. The Court found that the inclusion of material outside the record was improper, and awarded monetary sanctions. *Id.* at 1025-26.

Moreover, even if plaintiffs' selective enforcement theory were properly before this Court, it would fail on the merits. Plaintiffs' theory is based exclusively on their claim that "San Diego has refused to enforce its orders against the George Floyd protests." AOB 38. But non-enforcement against one group, taken alone, does not violate equal protection. Rather, a plaintiff must show *selective* enforcement – that a law was enforced against one group, and that it was not enforced against another. *See U.S. v. Armstrong*, 517 U.S. 456, 465 (1996) ("The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards." Thus, an individual who was prosecuted "must show that similarly situated individuals of a different race were not prosecuted."). Here, **plaintiffs do not claim that they were subject to any enforcement action**. Their selective enforcement theory is not viable.

Moreover, even if there had been any disparity in enforcement, plaintiffs' theory would fail for an additional reason, too. A selective enforcement plaintiff must show that a **similarly situated** individual or class was treated more favorably. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). Plaintiffs cannot do that here. They refer only to *outdoor* protests, which are categorically

different than gatherings in enclosed spaces, like churches.[5] Moreover, large-scale political protests—which have at times been tense, fraught, and dangerous—pose unique law enforcement challenges, and are not comparable to church services. Plaintiffs have not identified any "similarly situated" group, and their selective enforcement theory fails.

CONCLUSION

The County Defendants respectfully ask this Court to affirm the district court's order denying plaintiffs' Motion for a Temporary Restraining Order.

Dated: June 26, 2020

Respectfully submitted,

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[5] Moreover, as noted above, the state rules and the County's public health order now permit outdoor religious services, without numerical caps. *See* Section I.A, *supra*, at pp. 1-2.

CERTIFICATE OF BRIEF COMPLIANCE

9th Cir. Case Number(s) 20-55533

I am the attorney or self-represented party.

This brief contains 2,664 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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