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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
REDDING OFFICE

CALVARY CHAPEL OF UKIAH, a California Non-Profit Corporation; **CALVARY CHAPEL FORT BRAGG**, a California Non-Profit Corporation; and **RIVER OF LIFE CHURCH**, a California Non-Profit Corporation,

Plaintiffs,

vs.

GAVIN NEWSOM, in his official capacity as Governor of California; **SANDRA SHEWRY, MPH, MSW**, in her official capacity as California Public Health Officer; **NOEMI DOOHAN, M.D.**, in her official capacity as Public Health Officer, Mendocino County; and **NGOC-PHUONG LUU, M.D.**, in her official capacity as Butte County Public Health Officer,

Defendants.

Case No. 2:20-cv-01431-KJM-DMC

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Date: November 6, 2020
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Kimberly J. Mueller
Action Filed: July 15, 2020

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Pursuant to the Court's Order (Dkt. #68), Plaintiffs submit this supplemental Brief in support of their motion for preliminary injunction.

Question 1: How does the Regional Stay Home Order affect the court's analysis of plaintiffs' argument for injunctive relief made prior to the Order's issuance, if at all?

Short Answer: The December 3, 2020 Regional Stay Home Order strengthens Plaintiffs' case.

Under the Regional Stay Home Order, indoor worship services may only occur in regions of the state that are *not* currently experiencing particularly high infection rates impacting ICU capacity. As such, if the worship ban at issue in this case were enjoined, any singing and chanting at indoor worship services would only be occurring where local infection rates are *lower*. This fact, coupled with the high effectiveness of wearing masks, physical distancing, and limiting attendance, illustrates that a statewide ban on all singing and chanting at indoor worship services is neither necessary nor narrowly tailored.

Moreover, the temporary, local nature of the restrictions imposed by the Regional Stay Home Order stands in stark contrast to the permanent, statewide nature of the worship ban. The restrictions imposed by the Regional Stay Home Order are *local and conditional*; if, and only if, a region has a particularly high infection rate impacting ICU's do the restrictions take effect, and they only remain in effect for as long as those troublesome conditions exist. As such, the level of restrictions applicable in a particular area automatically adjusts, in real time, to reflect an increase, or decrease, in overall risk levels.

By contrast, the worship ban is *statewide and unconditional*; it applies everywhere across the state, at all times, regardless of what local conditions look like, what safety protocols are being utilized, how large the building is, how few people are singing or chanting, and how brief any singing or chanting may be. Even the Defendants acknowledge that the risks associated with singing or chanting indoors vary based on a variety of circumstances, and can be substantially reduced through safety protocols. *See, e.g.*, Dkt. #45 at 11 (discussing Pls.' Exh. 13 at 5 (Fig. 3)). There is simply no legal, or scientific, justification for an absolute ban on all singing and chanting at all indoor worship services, which may explain why (to our knowledge) no other state has enacted such an absolute ban. *Cf. Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206, 208-09 (U.S. Nov. 25, 2020) (noting that churches can safely operate at 25% or 33% capacity without any outbreaks, and the fact that a state's restriction is "much tighter than those

adopted by many other jurisdictions hard-hit by the pandemic" is strong evidence that the restriction is not narrowly tailored).

Finally, the fact that various other state and/or local restrictions (*e.g.*, stay home orders) will come and go while this litigation proceeds does not impact Plaintiffs' case for a preliminary injunction; that would be true even if the worship ban is eventually repealed during the pendency of this litigation. *See, e.g., id.* at 210-11 (issuing injunction even though the area in which the plaintiffs were located had been reclassified to a different risk tier since "the applicants remain under a constant threat that the area in question will be reclassified," and "[i]f that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained.").[1] The worship ban has been in effect for six months, remains in effect, and should be enjoined.

Question 2: How do recent controlling or persuasive court decisions, including those covered by the parties' notices of supplemental authority, inform the standard the court should apply to plaintiff's request and the analysis of that request? See ECF Nos. 62, 64, 65, 66, 67.

Short Answer: Recent controlling precedent, including the Supreme Court's *Roman Catholic Diocese* decision and the Ninth Circuit's *Calvary Chapel Dayton Valley* decision, demonstrate that the worship ban is (1) subject to strict scrutiny, and (2) unconstitutional since it is not scientifically necessary, is not narrowly tailored, other less restrictive measures are available, and the state allows non-religious activities of similar or greater risk to proceed.

I. *Roman Catholic Diocese* litigation

In *Roman Catholic Diocese*, the Supreme Court enjoined the enforcement of 10-person and 25-person attendance caps imposed upon religious services. 208 L. Ed. 2d at 207. Notably absent from the per curiam opinion was any reference to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), or any

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[1] *See also id.* at 214 (Gorsuch, J., concurring) ("To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the 'off' switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty."); *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 U.S. App. LEXIS 39266, at *2, n.1 (9th Cir. Dec. 15, 2020) ("Although the Directive is no longer in effect . . . Calvary Chapel's case is not moot. Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them. . . .").

1 suggestion that a court must defer to the political branches when they restrict constitutionally-protected
2 activities. To the contrary, the Court applied strict scrutiny and stated:

> 3 Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see
> 4 how the challenged regulations can be regarded as "narrowly tailored." They are far more
> 5 restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more
> 6 severe than has been shown to be required to prevent the spread of the virus at the applicants' services. . . .
>
> 7 [T]here are many other less restrictive rules that could be adopted to minimize the risk to those
> 8 attending religious services.[2]

9 *Roman Catholic Diocese* highlighted that it is not the burden of plaintiffs to prove that less
10 restrictive means would be effective; it is *the government's burden* to prove that they would be
11 ineffective.[3] Additionally, the Court's observation that the restrictions at issue were "much tighter than
12 those adopted by many other jurisdictions hard-hit by the pandemic," 208 L. Ed. 2d at 210, is particularly
13 relevant here because Plaintiffs are unaware of any other state that has banned all singing and chanting
14 at indoor worship services. As in *Roman Catholic Diocese*, "there are many other less restrictive rules
15 that could be adopted to minimize the risk to those attending religious services" without banning all
16 signing and chanting. *Id.* Indeed, the Supreme Court's observation that the plaintiff churches had
17 "operated at 25% or 33% capacity for months without a single outbreak," *id.* at 208—despite the lack of
18 any applicable ban on all singing and chanting—further illustrates that reasonable restrictions based on
19 building size and capacity, physical distancing, and requiring masks are effective measures that are more
20 than sufficient to curtail any potential for spreading COVID-19 at indoor worship services.

21 *Roman Catholic Diocese* also defeats Defendants' claim that the Court should ignore the risk of
22 spreading COVID-19 posed by a variety of non-religious conduct that the government permits. *See id.* at

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24 [2] *Id.* at 209; *see also id.* at 216-17 (Kavanaugh, J., concurring) ("[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious
25 discrimination, racial discrimination, free speech, or the like are raised.").

26 [3] *Id.* at 210 (emphasis added) ("[I]t has not been shown that granting the applications will harm the public. . . . *[T]he State has not shown* that public health would be imperiled if less restrictive measures were
27 imposed."); *cf. City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("Requiring a State to . . . show that it has adopted the least restrictive means of achieving [a compelling interest] is the most demanding test
28 known to constitutional law.").

208-09 (considering whether activities that were permitted at retail stores, manufacturing plants, acupuncture facilities, campgrounds, garages, etc., posed a similar or greater risk than the prohibited religious conduct).[4] As discussed in Plaintiffs' brief, Dkt. #45 at 9-12, the government allows conduct that poses a similar, or greater, risk of spreading COVID-19 as indoor church services, which illustrates that the worship ban is unconstitutional.[5]

Finally, *Roman Catholic Diocese* expressly rejected another argument made by the government here: that being able to view services online from one's home mitigates the harm:

> There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 . . . (1976) (plurality opinion). . . . [W]hile those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance.

208 L. Ed. 2d at 209-10.

When the *Roman Catholic Diocese* case returned to the Second Circuit, that court issued a decision that further supports Plaintiffs here. *Agudath Isr. v. Cuomo*, Nos. 20-3572 & 20-3590, 2020 U.S. App. LEXIS 40417 (2d Cir. Dec. 28, 2020). As in this case, the government relied upon some anecdotes about COVID-19 spread associated with "large gatherings," such as the infamous Washington choir practice, *id.* at *9-10, but the court noted that "[r]ecent public statements from the Governor cast some doubt on his experts' claims that religious worship is self-evidently riskier than secular activities." *Id.* at *24, n.18. The court noted that the use of safety protocols at the plaintiffs' worship services—such as limiting attendance, the regular cleaning of churches, mask requirements, and distancing requirements—had allowed the services to occur safely for several months without any outbreaks associated with the services. *Id.* at *11-13; *see also id.* at *28 ("[W]e grant no special deference to the executive when the

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[4] *See also Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, No. 20-4300, 2020 U.S. App. LEXIS 40856, at *5-6 (6th Cir. Dec. 31, 2020) (under *Roman Catholic Diocese*, "[w]hether conduct is analogous (or 'comparable') . . . does not depend on whether the religious and secular conduct involve similar forms of activity. Instead . . . comparability depends on whether the secular conduct 'endangers [the interests the State asserts] in a similar or greater degree than' the religious conduct does.").

[5] In any event, Plaintiffs' free speech claim does not require a showing of discrimination or disparate impact. Dkt. #19 at 12. The gross overbreadth of the worship ban—prohibiting even brief singing or chanting by one person—coupled with the existence of numerous less restrictive ways to curb the spread of COVID-19 are sufficient to show Plaintiffs' likelihood of success on the merits.

exercise of emergency powers infringes on constitutional rights. . . . [C]ourts may not defer to the Governor simply because he is addressing a matter involving science or public health.”).

Additionally, the court emphasized that the government cannot meet its burden to prove the lack of less restrictive alternatives by *assuming* that churches will not comply with such alternatives:

> [T]he Governor must explain why the Order’s density restrictions targeted at houses of worship are more effective than generally applicable restrictions on the duration of gatherings or requirements regarding masks and distancing. *The Governor may not, of course, presume that religious communities will not comply with such generally applicable regulations*. *See Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (“What [the Governor] can’t do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.”).

Id. at *24-25 (emphasis added).

II. *Calvary Chapel Dayton Valley*

The Ninth Circuit has confirmed that, under *Roman Catholic Diocese*, traditional strict scrutiny analysis applies to restrictions imposed upon houses of worship, *not* any relaxed or deferential standard. In *Calvary Chapel Dayton Valley*, the State of Nevada argued—like the Defendants in this case—that *Jacobson* “provides the proper framework governing a state’s authority during a public health crisis.” 2020 U.S. App. LEXIS 39266 at *5. *The Ninth Circuit rejected that claim*, just as the Supreme Court did, going as far as to state that *Roman Catholic Diocese* “arguably represented a seismic shift in Free Exercise law, and compels the result in this case.” *Id.* at *6; *id.* at *9 (“*Roman Catholic Diocese* compels us to reverse the district court. . . . [W]e will review the restrictions in the Directive under strict scrutiny.”).

Additionally, the Ninth Circuit repeated the Supreme Court’s express rejection of the argument—made by Defendants here—that courts must defer to the political branches:

> [E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

Id. at *6, n.3 (quoting *Roman Catholic Diocese*).

The Ninth Circuit concluded that, although Nevada’s directive was “less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*,” it was not narrowly tailored because other less burdensome measures, such as imposing a 50% attendance cap on houses of

worship, would satisfy the state's compelling interest in "slowing the spread of COVID-19." *Id.* at *10-11. The court held that Calvary Chapel had met the requirements for a preliminary injunction, and remanded the case for the entry of a preliminary injunction. *Id.* at *11. The same principles apply here and support Plaintiffs' motion for a preliminary injunction.

III. *South Bay and Harvest Rock*

The *South Bay* and *Harvest Rock* cases are clearly distinguishable from this case due to the vast differences in the scope of what the plaintiffs are challenging. Here, Plaintiffs have *only* challenged the worship ban; they *do not* challenge any other state or local regulation of church services (*e.g.*, attendance limits, mask or social distancing requirements, temporarily shutting down various activities in particularly high-risk areas of the state).

By contrast, the *South Bay* and *Harvest Rock* plaintiffs have challenged *a wide array of state and local restrictions*, such as attendance caps, the "Blueprint for a Safer Economy" (enacted August 28, 2020), and the December 3, 2020 Regional Stay Home Order.[6] For instance, the *South Bay* plaintiffs challenged an attendance cap of 25% capacity or 100 people (whichever was lower), and the Supreme Court noted in *Roman Catholic Diocese* that those provisions were far less restrictive than the 10-person and 25-person limits before the Court. 208 L. Ed. 2d at 209, n.2.

In *South Bay United Pentecostal Church v. Newsom*, Case No. 20-cv-00865-BAS, 2020 U.S. Dist. LEXIS 240361 (S.D. Cal. Dec. 21, 2020), the district court held that the plaintiffs had shown irreparable harm and, as such, only needed to show "a fair chance of success on the merits." *Id.* at *17-18. The court noted that "the Regional Stay at Home Order is subject to strict scrutiny review," and examined whether that order "is narrowly tailored to the compelling interest." *Id.* at *20-23. The district court ultimately concluded that the Regional Stay at Home Order was narrowly tailored. *Id.* at *22-30.[7]

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[6] *Gish v. Newsom*, in which the district court dismissed a challenge to bans on in-person worship services that were no longer in effect, is irrelevant to this case. *See* Dkt. #67; *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx), 2020 U.S. Dist. LEXIS 199305 (C.D. Cal. July 8, 2020).

[7] Although the court cited two anecdotal examples of COVID-19 spread associated with California churches, the court identified no evidence suggesting that such instances could not have been avoided through adherence to mask wearing, social distancing, and attendance cap requirements.

Defendants heavily rely on the following one-sentence order from the Ninth Circuit issued a few days later: "Appellants' Urgent Motion for an Injunction Pending Appeal Under Circuit Rule 27-3(b) (ECF No. 5) is DENIED without prejudice to renewing the request for injunctive relief in conjunction with the merits appeal." Dkt. #67 at 1-2, 8. However, the Ninth Circuit set a highly expedited briefing schedule "[g]iven that the issues presented . . . 'strike at the very heart of the First Amendment's guarantee of religious liberty,'" and oral argument was scheduled for today (January 15). *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2020 U.S. App. LEXIS 40273 (9th Cir. Dec. 23, 2020) (quoting *Roman Catholic Diocese*, 208 L. Ed. 2d at 210).

Similarly, in the *Harvest Rock* litigation, the plaintiffs have challenged a broad array of restrictions, such as the Blueprint for a Safer Economy and the December 3 Regional Stay at Home Order. After the Supreme Court vacated the Ninth Circuit's decision, *Harvest Rock Church v. Newsom*, No. 20A94, 2020 U.S. LEXIS 5709 (U.S. Dec. 3, 2020), the district court declined to issue a temporary restraining order. Dkt. #66-1. The case is now pending before the Ninth Circuit on an expedited basis, but one judge on the panel has already stated that "Harvest Rock Church's claims against California's restrictions appear strong" in light of *Roman Catholic Diocese* and *Calvary Chapel Dayton Valley*. *Harvest Rock Church, Inc. ex rel. Churches v. Newsom*, No. 20-56357, 2020 U.S. App. LEXIS 40413, at *3 (9th Cir. Dec. 23, 2020) (O'Scannlain, J., concurring in part and dissenting in part re: emergency motion for injunction pending appeal).[8]

Even if the Ninth Circuit were to ultimately hold that attendance limits, the Regional Stay at Home Order, etc. can survive strict scrutiny, that would not undermine Plaintiffs' case here. As discussed previously, under *Roman Catholic Diocese* and *Calvary Chapel Dayton Valley*, the existence of less restrictive ways to limit the spread of COVID-19—mask wearing requirements, physical distancing requirements, a reasonable attendance cap, temporarily shutting down activities (on a non-discriminatory basis) in particularly high-risk locations, etc.—as well as the fact that other jurisdictions have not gone

[8] *See also* Josh Gerstein, *9th Circuit skeptical of California church limits, but may uphold stay-home order*, Jan. 4, 2021, https://www.politico.com/states/california/story/2021/01/04/ninth-circuit-skeptical-of-california-church-limits-but-may-uphold-stay-home-order-1352401; U.S. Court of Appeals for the Ninth Circuit, 20-56357, *Harvest Rock Church, Inc. v. Gavin Newsom*, https://www.youtube.com/watch?v=-B5BHjGOqAA.

as far as to ban all singing and chanting in all indoor worship services, prove fatal to the worship ban. Plaintiffs' motion should be granted.

Respectfully submitted on January 15, 2021.

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