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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CALVARY CHAPEL SAN JOSE, a California Non-Profit Corporation; **PASTOR MIKE MCCLURE**, an individual; **SOUTHRIDGE BAPTIST CHURCH OF SAN JOSE CALIFORNIA dba SOUTHRIDGE CHURCH**, a California Non-Profit Corporation; **PASTOR MICAIAH IRMLER**, an individual;

Plaintiffs,

vs.

GAVIN NEWSOM, in his official capacity as the Governor of California, **TOMAS ARAGON, M.D.**, in his official capacity as the Acting California Public Health Officer; **SARA H. CODY, M.D.**, in her official capacity as Santa Clara County Public Health Officer; **MIKE WASSERMAN**, in his official capacity as a Santa Clara County Supervisor; **CINDY CHAVEZ**, in her official capacity as a Santa Clara County Supervisor; **DAVE CORTESE**, in his official capacity as a Santa Clara County Supervisor; **SUSAN ELLENBERG**, in her official capacity as a Santa Clara County Supervisor; and **JOE SIMITIAN**, in his official capacity as a Santa Clara County Supervisor;

Defendants.

Case No.: 20-cv-03794-BLF

PLAINTIFFS' OPPOSITION TO THE STATE'S MOTION TO DISMISS

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I. INTRODUCTION

In March 2020, California led America into a lockdown of society in which the State[1] decided which activities were "essential" and which were not. During that time, the State treated churches especially harshly, keeping them closed while indoor secular activities were allowed to operate. The State also subjected churches to strict mask mandates and singing bans while exempting numerous secular activities and entities. Those who defied the orders, like Plaintiffs, were vilified in the press and punished – in Plaintiffs' case, to the tune of $2.8 million in fines, plus hundreds of thousands of dollars in legal fees incurred to oppose the government's enforcement actions.

The U.S. Supreme Court has since vindicated Plaintiffs' position. *See Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020). And then again. *See South Bay Pentecostal Church, v. Newsom*, 141 S. Ct. 716 (2021) ("South Bay"). And again, three more times. *See Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). After these five decisions from the U.S. Supreme Court, the State eventually conceded that their *de facto* ban on religious worship was unconstitutional. They agreed to several statewide injunctions and paid millions of dollars in legal fees incurred by churches who challenged the unconstitutional COVID-19 orders. Nevertheless, and despite the profound harm inflicted on Plaintiffs by the State's patently unconstitutional COVID-19 orders, the State has refused to settle this case and now seeks to dismiss the operative TAC as moot and as failing to state a viable claim for relief.

The motion should be denied for three reasons.

First, the TAC alleges facts that state claims for violation of the Free Exercise Clauses of the federal and state constitutions. These claims are based not only on the disparate treatment aspect of the Free Exercise Clause – the issue addressed by the U.S. Supreme Court in prior litigation by churches against the State – but also on the substantial burden test, a test that was not addressed in the U.S. Supreme Court rulings but must be addressed by this Court to conclusively determine the constitutionality of the COVID-19 mandates.

[1] The "State" refers to Gavin Newsom, in his official capacity as the Governor of California, and Tomas Aragon, in his official capacity as the State Public Health Officer.

Second, Plaintiffs allege cognizable claims under the Equal Protection Clause and the Assembly Clause. The State denied Plaintiffs equal protection of the law by subjecting them to strict COVID-19 mandates on capacity, masks, and singing, while exempting a laundry list of secular entities and activities. The State violated the Assembly Clause by banning indoor gatherings and thereby denying Plaintiffs the ability to assemble and practice their religious tenets. The State's motion does not show otherwise. In fact, the State concedes that there are disputed issues regarding the constitutional validity of the COVID-19 orders by including several pages of briefing on the validity of the orders. Those arguments go to the merits of Plaintiffs' claims. Courts do not decide the merits at this stage. And constitutional claims are governed by the extremely liberal pleading standard in Rule 8. As the Court recognized in granting Plaintiffs leave to file an amended complaint, Plaintiffs' allegations easily clear that low bar.

Third, this case is not moot. The statewide injunctions bar the State from treating religious services differently than gatherings of similar risk. Plaintiffs seek to ensure the State cannot treat any secular entity or activity better than churches. Plaintiffs also dispute the State's authority to shutter churches, period. Further, the injunctions do not preclude the State from reimposing previous versions of the mask mandate and singing and chanting ban, and the State is continuing to impose a burdensome mask mandate.

In addition, contrary to the State's argument, there is a reasonable chance the State will reimpose previously rescinded orders, as evidenced by the Governor's refusal to terminate the COVID-19 state of emergency, and his suggestion that the "emergency" orders will last through next year, if not longer. In fact, the State essentially admits there is a reasonable likelihood that restrictions could be reimposed by reasserting it has the right to shutdown churches if public health officials decide a shutdown is necessary. State's motion to dismiss ("State's Mot.") at p. 5, ECF No. 121 ("the injunctions contain a provision allowing some restrictions on worship services in the event of an extreme upswing in hospitalizations and case rates"). With the State retaining the power to reinstate the orders in question and their proven willingness to use these coercive powers to burden the free exercise of religion, the case is far from moot.

Moreover, whether the health orders the State issued last year are unconstitutional is a dispositive issue in Plaintiffs' case against the County[2]. Importantly, the County fined Plaintiffs for violating both the State and County health orders, not just County orders. The County cannot collect $2.8 million in fines from Plaintiffs if the Court finds that the underlying state orders were invalid.

This case has taken far too long to litigate. But that does not make it moot, not when Plaintiffs are facing $2.8 million in fines and are headed into a winter in which the State has suggested it will do whatever it deems necessary to deal with COVID-19. Plaintiffs should not have to wait around to see if the State keeps churches open this winter. The First Amendment requires that they stay open and entitles Plaintiffs to a declaration that they should have remained open throughout the pandemic.

Accordingly, this Court should deny the State's **m**otion to **d**ismiss.

II. STATEMENT OF FACTS

A. The State's COVID-19 Orders

On or around July 6, 2020, the California Department of Public Health ("CDPH") ordered churches to refrain from singing and chanting. TAC, ¶ 64, ECF No. 116; Request for Judicial Notice (RJN), Ex. A. The CDPH did not ban singing and chanting in day camps or childcare centers. *Id.*, ¶ 70. The State also allowed "singing, shouting, playing a wind instrument, or engaging in similar activities" in restaurants and wineries as early as November 24, 2020. *Id.* Further, although the CDPH banned singing in schools on August 3, 2020, it softened the language in January 2021 to permit band practice, "provided that precautions such as physical distancing and mask wearing [were] implemented to the maximum extent possible." *Id.*, ¶ 65.

On August 28, 2020, the CDPH issued a public health order that set forth guidelines for reopening the state. *Id.*, ¶ 67, Ex. 10. These guidelines included a procedure for assigning counties to one of four tiers known as the Blueprint for a Safer Economy ("Blueprint"). *Id.* The Blueprint imposed harsher capacity restrictions on houses of worship than other secular entities and activities. *Id.*

On November 16, 2020, the CDPH issued an updated Guidance for the Use of Face Coverings ("Face Covering Guidance"), which generally mandated that face-coverings be worn outside of the

[2] The County refers to Santa Clara County, Sara Cody, in her official capacity as Santa Clara County Health Officer, James Williams, in his official capacity as Santa Clara County Counsel, and the Santa Clara County Board of Supervisors.

home at all times. *Id.*, ¶ 70, Ex. 12. The Guidance exempted people eating and drinking at a restaurant and persons for whom wearing a face covering would create a risk to the person related to their work, such as persons competing in sports *Id.*, ¶ 72. Television, film, and recording studios (i.e., Hollywood) were not required to follow COVID-19 guidelines, including the aforementioned Guidance and restrictions on singing and chanting. *Id.*, ¶ 73.

The current Face Covering Guidance issued on July 28, 2021, generally requires all unvaccinated individuals in indoor public settings like churches to wear a face covering. *Id.*, Ex. B. However, the Guidance still exempts individuals eating at a restaurant and persons participating in sports. *Id.* The TAC challenges the constitutionality of all COVID-19 orders, guidelines, and directives issued by the State during the pendency of this lawsuit, including the *current* Face Covering Guidance. TAC, ¶ 83, n. 1.

Beginning on or around August 2020, the County started fining Plaintiffs for violating mask mandates, the singing and chanting ban, and restrictions on indoor gatherings. *Id.*, ¶ 84, The fines were authorized by an ordinance adopted by the Santa Clara County Board of Supervisors. Ex. 18. The ordinance was adopted to enforce laws related to the "Public Health Orders", which encompasses "State Public Health Officer orders relating to the COVID-19 pandemic…." *Id.* at p. 7. The ordinance was also enforced in light of the 2020 Budget Act, which conditioned funds to counties based upon their "compliance with the State Health Officer orders." *Id.* at p. 3.

B. The Statewide Injunctions Regarding COVID-19 Orders

On May 14, 2021, the Central District of California signed a stipulated permanent injunction in *Harvest Rock Church v. Newsom*, C.D. Cal. No. 2:20-cv-06414-JGB, awarding the church attorney's fees and costs. *See* Decl. of Todd Grabarsky ISO Mot. to Dismiss (Grabarsky Decl.), Ex. 1. The State entered into several other statewide injunctions in other church cases. *Id.*, Exs. 2-4. The injunctions prevent California from issuing any capacity or numerical restrictions on religious worship services and gatherings at places of worship that are less favorable than restrictions imposed on *similar gatherings of similar risk*. Ex. 1 at p. 2. The injunctions make no mention of the Face Covering Guidance and only requires that restrictions or prohibitions on the religious exercise of singing and chanting to be generally applicable to the guidance for live events. *Id.* at pp. 2-3. Plaintiffs' TAC compares churches to a broad

range of activities and entities like personal care services, hair salons, schools, day camps, protests, recording studios, and sporting events. TAC, ¶¶ 6, 50-51, 56, 64-66, 70-76, 78.

The injunctions do not preclude the State from reimposing previous versions of the Face Covering Guidance or the singing and chanting ban. The State still believes they have the power to ban indoor religious gatherings. *Id.*, ¶ 83. "There is a real risk of this happening, with a new COVID-19 variant (the "Delta" variant) spreading across the globe and the Governor refusing to lift the COVID-19-related state of emergency." *Id*. Indeed, on June 11, 2021, the Governor issued another executive order continuing the state of emergency indefinitely "to preserve the flexibility to modify public health directives and respond to changing conditions and to new changing health guidance from the Center for Disease Control…." RJN, Ex. C.

III. LEGAL STANDARD

In considering a motion to dismiss filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). This is a very liberal standard. "In order for a complaint to survive a 12(b)(6) motion, it must state a claim for relief that is plausible on its face." *In re Med. Cap. Sec. Litig.*, 842 F. Supp. 2d 1208, 1210 (C.D. Cal. 2012). "A claim for relief is facially plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct." *Id.*

This standard is especially liberal when applied to the constitutional claims alleged in this action, which are governed by Rule 8. Rule 8's burden is "minimal," and requires only that the plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Westways World Travel v. AMR Corp.*, 182 F. Supp. 2d 952, 955 (C.D. Cal. 2001) (quotations omitted). "It is the burden of the party bringing a motion to dismiss for failure to state a claim to demonstrate that the requirements of Rule 8(a)(2) have not been met." *Id.*

IV. ARGUMENT

The Court should deny the State's motion to dismiss because the TAC adequately alleges several constitutional claims against the State and because, despite the State's protestations, this controversy is not moot.

A. Plaintiffs Allege Cognizable Claims For Relief.

Plaintiffs allege three valid causes of actions. First, Plaintiffs allege facts that show the State's health orders constitute a substantial burden on Plaintiffs' religious exercise in violation of the Free Exercise Clause of both the federal and state constitutions and, in the alternative, are not neutral or generally applicable. Second, Plaintiffs allege the State violated the Equal Protection Clause by subjecting Plaintiffs to harsher restrictions than secular entities and activities throughout the COVID-19 pandemic. Finally, Plaintiffs state a claim for relief under the Assembly Clause because the State interfered with Plaintiffs' ability to assemble and practice their religious tenets – a claim the State does not dispute in their motion. State's Mot. at pp. 10-13.

1. Plaintiffs Allege Facts that Show the State Health Orders Constitute a Substantial Burden on Plaintiffs' Religious Exercise in Violation of the Free Exercise Clause.

Government actions that substantially burden a religious practice must be justified by a compelling government interest. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Penalizing an individual for engaging in a religious practice clearly constitutes a substantial burden, and even "indirect 'discouragements'" can qualify. *Id.* at 404 n.5. "[T]he religion clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution." *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 629 (1996). Courts "therefore review [a] challenge…under the free exercise clause of the California Constitution in the same way [they] might have revied a similar challenge under the federal constitution after *Sherbert.* In other words, we apply strict scrutiny." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004) (citations omitted).

The State will likely argue *Sherbert* is not an applicable test. However, in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021), Justice Barrett, joined by Kavanaugh and Breyer, held: "I find the historical record more silent than supportive on the question whether the founding generation

1 understood the First Amendment to require religious exemptions from generally applicable laws in at
2 least some circumstances. In my view, the textual and structural arguments against *Smith* are more
3 compelling." Further, Alito, joined by Thomas and Gorsuch, emphasized the following: "*Smith* did not
4 overrule *Sherbert* or any of the other cases that built on *Sherbert* from 1963 to 1990, and for the reasons
5 just discussed, *Smith* is tough to harmonize with those precedents. The same is true about more recent
6 decisions." *Id.* at 915.

7 For instance, the Court has provided exemptions from generally applicable laws in First
8 Amendment cases. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000), the Court granted an
9 exemption from an otherwise generally applicable state public accommodation law. Similarly, in *Hurley*
10 *v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 573 (1995), the
11 parade sponsors' speech was exempted from the requirements of a similar public accommodation law.
12 Exemptions from generally applicable laws have been granted to religious schools. In *Hosanna-Tabor*
13 *Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the Court held the First
14 Amendment entitled a religious school to a special exemption from the ADA.

15 More recently, the Supreme Court in *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights*
16 *Comm'n*, observed that "[w]hen it comes to weddings, it can be assumed that a member of the clergy
17 who objects to gay marriage on moral and religious grounds could not be compelled to perform the
18 ceremony without denial of his or her right to the free exercise of religion." 138 S. Ct. 1719, 1727
19 (2018). "The clear import of this observation is that such a member of the clergy would be entitled to a
20 religious exemption from a state law restricting the authority to perform a state-recognized marriage to
21 individuals who are willing to officiate both opposite-sex and same-sex weddings." *Fulton,* 141 S. Ct.
22 at 1868.

23 In this same vein, Plaintiffs seek relief preventing the State from interfering with their free
24 exercise of religion, regardless of whether the law is neutral or generally applicable. Plaintiffs have
25 alleged that indoor worship is an essential part of their religion and thus that the State's health orders
26 imposed a substantial burden on their exercise of those religious beliefs. TAC, ¶¶ 90, 104, 112. Plaintiffs
27 have also alleged that the State orders interfered with their religious tenets like communion, singing,
28 worshiping with unveiled faces, and one-on-one prayer. *Id.*, ¶¶ 90-92, 104, 112. Further, Plaintiffs were

punished for violating the State's orders; they have been cited and fined nearly $3 million by the County for violating both the County and State health orders. *Id.*, ¶¶ 84, 105. Under the Rule 8's liberal pleading standards, the TAC states a claim for relief under the Free Exercise Clause.

The State cannot show otherwise. In fact, its motion did not contain any discussion of the "substantial burden" aspect of the Free Exercise Clause. State's Mot. at pp. 10-11. It focused on a different test, discussed below, through which a plaintiff can prove a free exercise claim by showing that the government discriminates against religion. For this reason alone, the motion should be denied.

2. Plaintiffs Allege Facts that Show the State Health Orders Are Not Neutral and Generally Applicable in Violation of the Free Exercise Clause.

The TAC also alleges facts sufficient to show that the State's public health orders violated the Free Exercise Clause by treating churches less favorably than comparable secular activities. "In determining whether a law prohibits the free exercise of religion, courts first ask whether the law is neutral and of general applicability." *Gateway City Church v. Newsom*, No. 5:20-cv-08241-EJD, 2021 WL 308606 (N.D. Cal. Jan. 29, 2021) (quotations omitted). "If a law is not neutral and generally applicable, the law must survive strict scrutiny review." *Id.* The Supreme Court's decisions during the COVID-19 pandemic "arguably represented a seismic shift in Free Exercise law." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020). Now it is clear that the government can violate the disparate treatment component of the Free Exercise Clause by "treat[ing] numerous secular activities and entities significantly better than religious worship services …." *Id.* at 1233; *see also S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1140-41 (9th Cir. 2021) (holding that courts must apply strict scrutiny "whenever a state imposes different capacity restrictions on religious services relative to non-religious activities and sectors").

Indeed, since *Roman Catholic Diocese Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court has consistently vacated lower court decisions denying injunctive relief on behalf of churches. *See, e.g., Harvest Rock Church*, 141 S. Ct.; *Robinson v. Murphy*, 141 S. Ct. 972 (2020)*; High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Gish*, 141 S. Ct. Importantly, the Supreme Court has admonished the Ninth Circuit five times because it upheld California's COVID-19 restrictions on capacity limits as applied to religious exercise. *See Harvest Rock Church*, 141 S. Ct.; *Gish*, 141 S. Ct.;

South Bay, 141 S. Ct. (enjoining California's ban on indoor gatherings at churches); *Gateway City Church*, 141 S. Ct. (enjoining Santa Clara County's ban on indoor gatherings at churches); *Tandon*, 141 S. Ct. (enjoining California's ban on private religious gatherings).

There is no doubt the State's Blueprint and ban on indoor religious gatherings are a dead letter, and the State does not argue otherwise. State's Mot. at pp. 10-11. Regarding the State's singing and chanting ban and Face Covering Guidance, Plaintiffs adequately allege the orders violate the Free Exercise Clause by placing certain categories of secular activities or institutions in a favored category, while placing religious activities in a less favorably category, such as by denying them exemptions. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 650 (10th Cir. 2006) ("When a law has secular exemptions, a challenge by a religious group becomes possible.").

Here, Plaintiffs establish that the State's singing ban and Face Covering Guidance carve out exemptions for schools, day camps, childcare centers, restaurants, protestors, personal care services, sporting events, and television, media, and recording studios. TAC, ¶¶ 6, 50-51, 56, 64-66, 70-76, 78. The State's argument that the Face Covering Guidance was neutral because it allowed congregants to remove their mask while taking communion is untrue and improper at this stage because it goes to the merits of Plaintiffs' allegations. Plaintiffs allege the Guidance exempted people actively eating and drinking *at restaurants*. *Id.*, ¶ 71. Consistent with the Face Covering Guidance, Plaintiffs allege the Guidance for Restaurants and Wineries allowed individuals to remove their mask while dining. *Id.*, ¶ 78, Ex. 16. Conversely, the July 6, 2020, guidance for houses of worship did not allow congregants to remove their mask while taking communion. RJN, Ex. A. Plaintiffs also allege that the State orders interfered with Plaintiffs' religious practices, including the partaking of holy communion. TAC., ¶ 71. The Court must accept these allegations as true and construe all factual allegations in the light most favorable to Plaintiffs.

In addition to restaurants, the State exempted "persons for whom wearing a mask would create a risk to the person related to their work, such as *persons competing in sports*." *Id.*, ¶ 72 (emphasis added). The Face Covering Guidance also exempted "persons who [were] obtaining a service involving the nose or face", and "[p]ersons who [were] specifically exempted from wearing face-coverings by

other CDPH guidance." *Id.*, Ex. 12 at p. 3. The Guidance for Personal Care Services allowed customers to remove their mask while receiving a facial or esthetic care. *Id.*, ¶ 76, Ex. 15. Most notoriously, California did not require television, film, and recording studios to follow the COVID-19 orders. *Id.*, ¶ 73. The *current* Face Covering Guidance still exempts sporting events but not churches. RJN, Ex. B. This disparate treatment warrants strict scrutiny review.

Plaintiffs have alleged the State fails strict scrutiny because they cannot demonstrate "clearly that nothing short of [their] measures [would] reduce the community spread of COVID-19 at indoor religious gatherings to the same extent as the restrictions the [State] enforce[d] [] with respect to other activities…." *South Bay*, 141 S. Ct. at 716. The State had no evidence that COVID-19 was spreading at a greater rate inside churches in comparison to indoor settings open during the pandemic. TAC, ¶ 47. The State's theory that churches were dangerous because people gathered close together for extended periods of time and sang together was pure speculation, "unsupported by evidence and based on stereotypes of people who attend churches…." *Id.*, ¶ 49. Any argument by the State disputing Plaintiffs' allegations would go to the merits and be improper at this stage.

Finally, the State's reliance on *Calvary Chapel of Ukiah v. Newsom*, 524 F. Supp. 3d 986, 1002-04 (E.D. Cal. 2021) is unavailing. State's Mot. at p. 10. There, when considering whether plaintiffs had a likelihood of success on the merits of a preliminary injunction, the court considered the State's declaration and expert witness testimony. *Id.* at 1002-04. The court was especially convinced by the State's *contested* declaration that Hollywood had "been subject to stringent requirements negotiated between studios and unions, and effectively blessed by the State." *Id.* at 1003. Plaintiffs respectfully disagree with the court's holding and are confident their allegations will prevail through discovery. Regardless, this Court cannot consider the merits at this stage and can only consider Plaintiffs' allegations, which establish that the State granted an exemption to Hollywood, among other industries. TAC, ¶¶ 6, 50-51, 56, 64-66, 70-76, 78. Given the facts this Court must assume to be true, and the facts which may later be discovered that are consistent with the pleaded facts, Plaintiffs easily satisfy Rule 8's liberal pleading standard.

3. Plaintiffs Allege Facts that Show the State Violated the Equal Protection Clause.

Plaintiffs also allege a claim for relief under the Equal Protection Clause. The Equal Protection Clause provides that "[n]o State shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Equal protection requires the state to govern impartially – not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. V. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985). Strict scrutiny applies under the Equal Protection Clause where, as here, the classification impinges on a fundamental right, including the right to practice religion freely, the right to free speech and assembly, and the right to travel, among others. *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988). Importantly, Plaintiffs need not allege that the State's classification is based upon gatherings of similar risk, nor do Plaintiffs do so.

Plaintiffs allege the State violated the Equal Protection Clause by issuing health orders that treat religion as less essential and more dangerous than numerous secular entities and activities. TAC, ¶ 127. For instance, throughout most of 2020, the State deemed churches as non-essential, while declaring a laundry list of entities essential, such as pet stores and liquor stores. *Id.*, ¶¶ 40-41. In addition to relegating Plaintiffs to a second-class status, the State has imposed strict mask mandates and singing bans on churches but granted, and still grants, exemptions to secular industries like sporting events. *Id.*, ¶¶ 6, 50-51, 56, 64-66, 70-76, 78; RJN, Ex. D. Further, as noted above, the State cannot satisfy strict scrutiny; their arbitrary classifications were not narrowly tailored measures because there was no evidence churches were more dangerous than secular entities and activities subject to less stringent restrictions.

4. Plaintiffs Allege Facts That Show the State Violated the Assembly Clause.

Finally, Plaintiffs allege a claim for relief under the Assembly Clause. "The right of free speech, the right to teach, and the right to assembly, are, of course, fundamental rights." *Whitney v. California*, 274 U.S. 357, 373 (1927). The right to peaceably assembly ensures the freedom of individuals to associate for the purpose of engaging in protected speech. *Jefferson v. City of Fremont*, No. C-12-0926 EMC, 2013 WL 1747917, at *5 (N.D. Cal. Apr. 23, 2013); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing right to associate "for the purpose of engaging in those activities protected

by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”). When a government practice restricts fundamental rights, it is subject to “strict scrutiny” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sc. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Here, Plaintiffs’ religious beliefs require that they regularly gather in person for the teaching of God’s Word, prayer, worship, and fellowship. TAC, ¶ 127. The State infringed upon the Assembly Clause when they banned religious gatherings. *Id.*, ¶¶ 117, 121. And, as stated above, the State cannot justify their draconian ban on Plaintiffs’ gatherings at this stage. Accordingly, Plaintiffs, yet again, allege another cognizable claim for relief – a claim that the State conveniently disregards in their briefing. State’s Mot. at pp. 10-13.

B. The State’s Motion To Dismiss Will Not Dispose Of All Claims Against The State Because Plaintiffs’ Claims Are Not Moot.

This case is not moot because the Face Covering Guidance is still operative. RJN, Ex. B. The TAC challenges the “State and County Orders” issued during the pendency of this lawsuit, which encompasses the *current* Face Covering Guidance. TAC ¶ 83, n. 1; 28:3-4. For this reason alone, this case is not moot. Regarding rescinded orders like the singing and chanting ban, capacity restrictions, and previous versions of the Face Covering Guidance, the statewide injunction entered in other church cases have no binding, preclusive effect. Thus, the voluntary cessation and capable of repetition, yet evading review doctrines apply. Finally, this case is not moot because Plaintiffs seek a declaratory judgment that the State public health orders are unconstitutional. *Id.,* at p. 28:1-2. Such a determination is critical in deciding the constitutionality of the 2.8 million dollars of fines levied against Plaintiffs at the direction of the State. *Id.*, ¶ 84.

1. The Statewide Injunctions Do Not Moot Plaintiffs’ Claims.

The State makes much about the statewide injunctions entered against them last spring, which they say ensure the State will not violate Plaintiffs’ rights in the future. Those injunctions do not moot this case or prevent the Court from ordering effective relief.

1 *First*, the injunctions do not preclude the State from reimposing the previous Face Covering
2 Guidance and singing and chanting ban and only prohibit the State from treating religious activities less
3 favorably than "similar gatherings of similar risk." Grabarsky Decl., Ex. 4 at p. 2. The injunctions do
4 not, for instance, preclude the State from treating Plaintiffs different than sporting events – a distinction
5 the State continues to draw in their *current* Face Covering Guidance. RJN, Ex. D. Here, Plaintiffs allege
6 they were treated differently than non-analogous entities and activities like schools, day camps, hair
7 salons, protests, restaurants, and sporting events. TAC, ¶¶ 6, 50-51, 56, 64-66, 70-76, 78. Plaintiffs seek
8 to ensure the State cannot treat Plaintiffs different than any other secular entity or activity, not just those
9 the State deems are of "similar risk." Further, the injunctions do not prevent the State from taking
10 actions that impose a substantial burden on Plaintiffs' free exercise rights and to peaceably assemble,
11 issues that, as explained above, are still being litigated here. *See Infra*, at pp. 6-12. Thus, the voluntary
12 cessation and capable of repetition, yet evading review doctrines apply.

13 *Second*, the State has repeatedly ignored other court orders during the COVID-19 pandemic,
14 including U.S. Supreme Court decisions that clearly established a right to religious freedom during the
15 pandemic. The U.S. Supreme Court admonished the State for this, saying in *Tandon* that "[t]his is the
16 fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID
17 restrictions on religious exercise" and that it should be "unsurprising that such litigants are entitled to
18 relief." 141 S. Ct. at 1297-98. As a result, the State paid millions of dollars to settle many of the cases
19 filed against it by churches during the pandemic. *See* Grabarsky Decl., Exs. 1-4.

20 For some reason, the State will not settle with Plaintiffs or stipulate to a judgment that the
21 challenged health orders violated Plaintiffs' constitutional rights and will not be issued again. That is
22 disappointing. Plaintiffs have been vilified during the pandemic. They were fined $2.8 million for
23 violating State and County public health orders and have spent more than a year in court trying to protect
24 their rights. If the State will not settle or stipulate to judgment, Plaintiffs deserve a chance to litigate
25 their claims and to prove their case at trial—even if all it results in is a judicial declaration that the State
26 health orders violated Plaintiffs' rights and an appropriate injunction is granted. An appropriate
27 injunction here would ensure the State cannot close churches again, or at a minimum, that the State
28 cannot impose restrictions on churches while exempting any other secular business.

2. Voluntary Cessation Doctrine.

"A case becomes moo – and therefore no longer a 'Case' or 'Controversy' for purposes of Article III – when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014) (cleaned up). A case may become moot if the defendant shows it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. But this is a high standard. "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

This rule is applied especially strictly toward the government. "Courts presume that government entities act in good faith when making changes to policies, but 'when the Government asserts mootness based on such a [policy] change, it must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again.'" *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1338 (W.D. Wash. 2018) (quoting *Rosebrock*, 745 F.3d at 971)). A court is more likely to find mootness if: "(1) the policy change is evidenced by language that is broad in scope and unequivocal in tone; (2) the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case; (3) the case in question was the catalyst for the agency's adoption of the new policy; (4) the policy has been in place for a long time …; and (5) since the policy's implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff …." *Rosebrock*, 745 F.3d at 971. A court is unlikely to apply the mootness doctrine where a new policy "could be easily abandoned or altered in the future." *Id.*

That is the case here. The State says it is not likely that it will reimpose non-pharmaceutical measures like last year's public health orders to respond to COVID-19 because vaccines are now available and do a better job of controlling the virus' spread. State's Mot. at p. 8. But it is not clear that the government can force everybody to get a COVID-19 shot, especially in California whose state constitution includes an express right to privacy that explicitly protects an individual's right to bodily integrity. Cal. Const. Art. 1, § 1. Furthermore, although the Governor has terminated most of the COVID-19 public health orders, he has refused to terminate the state of emergency, so he can retain

flexibly in issuing COVID-19 orders. TAC, ¶ 83; RJN, Ex. D. Thus, it is entirely possible that the State will reimpose previously rescinded orders, especially as we head into the winter, when respiratory viruses generally spread more widely.

Even if the State is correct, the statement is not "broad in scope and unequivocal in tone." The proposed change does not address all of Plaintiffs' objections to the orders, including the mask mandate. This case did not lead to the proposed changes. And the COVID-19 policies have not been in place for a long time. Moreover, the State's comment about it being unlikely to issue similar health orders in the future is not an official policy but is simply a statement made by a government lawyer in a pleading. Thus, under *Rosebrock*, the State's comment about not issuing future COVID-19 orders does not amount to a fundamental policy change that requires dismissing the case as moot.

The Ninth Circuit reached a similar conclusion in *Brach v. Newsom*, 6 F.4th 904, 919 (9th Cir. 2021), saying that "the State's coy assertion that it is 'speculative' whether it might close schools again merely underscores the State's refusal even to say that it *will not* do so." The Supreme Court said the same thing in *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021), explaining that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not moot the case." "[California] officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Id.* (quoting *South Bay*, 141 S. Ct. at 720). Given the State's track record and broad retention of power to impose future COVID-19 orders, the State has not carried its formidable burden under the voluntary cessation doctrine.

3. Capable of Repetition, Yet Evading Review Doctrine.

The State's health orders also fall squarely into the category of official acts that are capable of repetition, yet evading review. A court has jurisdiction over a dispute where "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011). As to the second prong, the Court has "found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988).

First, since March 2020, the State has changed its health orders frequently. If California were to reimpose restrictions on churches, "by the time a future case challenging the new mandate could receive complete judicial review, which includes Supreme Court review, the State would likely have again changed its restrictions before that process could be completed." *Brach*, 6 F.4th at 921. Effective relief for Plaintiffs "likely could not be provided in the event of any recurrence, which makes this a paradigmatic case for applying the doctrine of 'capable of repetition, yet evading review.'" *Id.*

Second, "there is a reasonable expectation that the [Plaintiffs] will be subjected to the same action again." *Turner*, 564 U.S. at 440. Although the State says they are unlikely to impose similar restrictions in the future, they have not committed to doing so, and the arguments they made in the motion suggest that they believe they can close churches, so long as they close other indoor activities. State's Mot. at pp. 3-9. Moreover, since the Governor has not terminated the COVID-19 state of emergency—and has suggested it could last through next year – it is reasonable for Plaintiffs to expect that they will be forced to close their church again or incur additional fines from Santa Clara County. Therefore, the Court should hold that Plaintiffs' claims against the State are not moot.

4. <u>Declaratory Judgement is Necessary to Afford Plaintiffs' Meaningful Relief.</u>

There are 2.8 million more reasons why this case is not moot. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 567 U.S. at 307. Regarding declaratory relief, "the plaintiff must show that the policy has adversely affected and continues to affect a present interest." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017) (cleaned up). Here, the County has fined Plaintiffs 2.8 million dollars, as authorized by the County's ordinance. TAC, ¶ 84, Ex. 18. The fines derive from state policy – namely –Plaintiffs' violations of the State's ban on indoor gatherings and singing and their mask mandate. *Id.* A declaratory judgement that the State's orders are unconstitutional will be critical in resolving the constitutionality of the fines – an issue that presently and profoundly affects Plaintiffs.

The State will likely argue they are not a necessary party because the County fined Plaintiffs. However, the State cannot hide behind the County's ordinance – not when they conditioned funds to

the County based upon their compliance with the State public health orders. *Id.* at p. 3.[3] The State used financial coercion to deputize the County to carry out their COVID-19 orders, and now that the orders they coerced the County to adopt have been challenged, they are attempting to evade review of their actions by hiding behind the County. The State cannot have their cake and eat it too. Allowing the State to shield their actions from review by acting through the 58 counties in California would not only harm Plaintiffs' ability to obtain redress for their injuries, but it would also thwart the government interest in judicial efficiency by forcing similarly situated plaintiffs to sue individual counties to obtain redress for what is, at bottom, a state mandate masquerading as a series of county ordinances.

C. Plaintiffs Can Amend The Third Amended Complaint To Resolve Any Uncertainties.

Government orders have changed quickly and often during the COVID-19 pandemic. Thus, if the Court believes that any of Plaintiffs' claims against the State need to be updated to reflect recent events, or need further clarity, it should grant them leave to amend, consistent with the Ninth Circuit's direction to do so with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990). But that should not be necessary. The complaint can be amended to conform to proof later. This case has been pending for too long already. The complaint easily clears the low pleading burden in Rule 8. The case against the State should move into discovery and toward trial.

V. CONCLUSION

Plaintiffs respectfully request that this Court deny the State's motion to dismiss in its entirety. Plaintiffs have sufficiently pled causes of action under the United States and California Constitutions. Plaintiffs should have a full and fair opportunity to engage in discovery and seek full relief from the Court. Should any additional allegations be required to cure any pleading defects, Plaintiffs should be granted leave to amend their TAC.

[3] It is common knowledge that public funding is used by high-ranking government entities to influence the decisions of lower-ranking government entities. This illustration is typified in commandeering cases, where funding programs are used in a persuasive and, at times, coercive manner. *See, e.g., Printz v. United States,* 521 U.S. 898, 925-26 (1997); *New York v. United States*, 505 U.S. 144, 169-174 (1992); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-90 (1937). Considering Plaintiffs' allegations and all reasonable inferences that must be drawn in their favor, they easily satisfy the liberal pleading standard in Rule 8.

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Respectfully submitted,

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