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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CALVARY CHAPEL SAN JOSE, et al.,

Plaintiffs,

vs.

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

Defendants.

Case No.: 20-cv-03794-BLF

PLAINTIFFS' AMENDED OPPOSITION TO THE COUNTY DEFENDANTS' MOTION TO DISMISS

Date: March 10, 2022
Time: 9:00 a.m.
Crtrm: 3
Judge: Hon. Beth Labson Freeman

I. INTRODUCTION

In May 2020, four justices on the United States Supreme Court said that preventing people from gathering inside a church during the COVID-19 pandemic violated the First Amendment. Nonetheless, starting in August 2020, the County Defendants repeatedly went after Plaintiffs for not following their arbitrary COVID-19 orders. They fined Plaintiffs $2.8 million for not following their orders. That was not proper. It led Plaintiffs to file this action and to obtain the Court's permission to file an amended complaint. The County Defendants' motion to dismiss should be denied for the following reasons.

First, the Third Amended Complaint (TAC) alleges facts sufficient to show that the County Defendants violated Plaintiffs' rights under the First and Fourteenth Amendments by treating religious activities worse than similar secular activities.

Second, the TAC pleads facts sufficient to allege that the $2.8 million fine violates the Eighth Amendment. The factual arguments raised in the Motion do not change that. They require the development of evidence.

Third, for the same reason, the Court cannot dismiss Plaintiffs' claim for First Amendment retaliation against Defendant Williams (the County Counsel) and the County (via the Supreme Court's decision on municipal liability in *Monell v. Department of Social Services*). A First Amendment retaliation claim exists when a government official takes some action against a plaintiff exercising its constitutional rights that would deter a person of ordinary firmness from continuing to engage in the protected activity. The FAC alleges that Mr. Williams, a final policymaker, did that by sending threatening letters to Plaintiffs' bank.

Finally, the case is not moot. A new variant (dubbed "Omicron") is circulating. The Governor just issued a new mask mandate. Further, the County Defendants have not dismissed the $2.8 million fine or reimbursed Plaintiffs damages stemming from Mr. Williams' retaliatory bank letters. This case should proceed to discovery and be decided on the merits, with the benefit of a full evidentiary record.

II. LEGAL STANDARD

When deciding a Rule 12(b)(6) motion, "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). The 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).

III. ARGUMENT

The Court should deny the Motion because the TAC adequately alleges constitutional claims against the County Defendants and because this controversy is not moot.

A. The TAC Alleges that the County Defendants Violated Their Freedom of Religion.

The TAC adequately alleges violations of the Free Exercise Clause, Equal Protection Clause, and Assembly Clause.

Free Exercise Clause. The TAC alleges facts sufficient to show that the County's public health orders violated the Free Exercise Clause by treating churches less favorably than comparable secular activities. TAC, ¶¶ 103, 105-06. There is no doubt the County's ban on indoor religious gatherings is a dead letter. The Supreme Court has already admonished the County for its patently unconstitutional order. *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) ("Gateway") (enjoining Santa Clara County's ban on indoor gatherings at churches). Regarding the State and County's face-covering mandate, the Plaintiffs have alleged that the Face Covering Guidance carves 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 Face Covering Guidance issued on December 13, 2021, in light of the omicron variant mandates face coverings in all indoor public settings but still exempts athletes. RJN, Ex. F. This disparate treatment warrants strict scrutiny, and the County cannot justify its discriminatory treatment of churches at this stage.

Equal Protection Clause. Plaintiffs also allege a claim for relief under the Equal Protection Clause because the County consistently imposed harsher capacity restrictions on churches, while allowing a litany of secular entities and activities to remain open or operate under less stringent restrictions. TAC, ¶¶ 62, 68-69, 83, 127-28. The State and County have also imposed strict mask mandates but granted, and still grant, exemptions to secular industries like sporting events. *Id.*, ¶¶ 6, 50-

51, 56, 64-66, 70-76, 78; RJN, Ex. F. Like with the Free Exercise Clause, this disparate treatment violates the Equal Protection Clause.

Assembly Clause. Finally, Plaintiffs adequately allege a claim for relief under the First Amendment's Assembly Clause. TAC, ¶¶ 116-17. Plaintiffs' religion requires that they regularly gather in person for the teaching of God's Word, prayer, worship, and fellowship. TAC, ¶ 127. The County infringed upon the Assembly Clause when they banned religious gatherings. *Id.*, ¶¶ 117, 121.

Finally, to the extent the County Defendants argue that qualified immunity shields them from liability under the First and Fourteenth Amendments because they did not violate clearly established law when discriminating against Plaintiffs' religious freedom, that "is an affirmative defense that must be raised by a defendant." *Groten v. Cal.*, 251 F.3d 844, 851 (9th Cir. 2001). "Thus, a Rule 12(b)(6) dismissal is not appropriate unless [a court] can determine, based on the complaint itself, that qualified immunity applies." *Id.*; *see also Ethridge v. Doe*, No. 1:12-CV-02088-AWI, 2014 WL 6473654, at *6 (E.D. Cal. Nov. 18, 2014), report and recommendation adopted sub nom. *Ethridge v. Lawrence*, No. 1:12-CV-02088-AWI, 2015 WL 153821 (E.D. Cal. Jan. 12, 2015) (explaining that this is "because facts necessary to establish this affirmative defense generally must be shown by matters outside the complaint"). Thus, the County Defendants must raise qualified immunity as a defense and prove it at trial, after giving Plaintiffs an opportunity to gather evidence to support their claims.

Even if this Court addresses qualified immunity at this stage, the County's argument fails. The County's gathering rules violated clearly established LAW long before *Gateway*. County's Mot. at 6. The County's gathering rules contravened the Supreme Court since its decision in *Roman Catholic Diocese of Brooklyn vs. Cuomo*, 141 S. Ct. (2020) ("Brooklyn Diocese"). For the avoidance of doubt, the Court in *Gateway s*pecifically held that the outcome was "clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom*, 592 U. S. ___ (2021)." *Gateway*, 141 S. Ct. And the Court in *South Bay Pentecostal Church v. Newsom* relied on *Brooklyn Diocese* to enjoin California's ban on indoor gatherings. 141 S. Ct. 716, 719 (2021) ("Recently, this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution.") Thus, the County's gathering rules were clearly unconstitutionally since November 2020, and arguably earlier.

B. The Excessive Fine Claim Must Be Decided on a Full Evidentiary Record.

A fine is unconstitutionally excessive under the Eighth Amendment if the amount "is grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998). A court must consider four factors, the most important of which is "the extent of the harm caused by the offense." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020).

The TAC adequately alleges these facts. TAC, ¶ 134. The complaint also alleges that the fines "were not issued until August 2020, when County Officials knew that COVID-19 was not spreading *en masse* in churches and thus that indoor worshipping was not a menace to public health." *Id.*, ¶ 84. It specifically alleges that "no COVID-19 case has been traced to Plaintiffs' church gatherings" and that the fines were issued "to deter CCSJ and Pastor McClure from continuing to fight [the County's COVID] orders in court." *Id.*, ¶ 85. Those are not frivolous allegations: Plaintiffs were litigating this case, trying to halt the County's discriminatory health orders, when the County started levying the fines.

Instead of showing how the TAC is deficient on its face, the County Defendants argued that the $2.8 million fine is not excessive because "Plaintiffs' violations were egregious and put large numbers of people at imminent risk, both within the church and the greater community." County's Mot. at 16:8-9; *see also id.* at 16:11-16 (citing declarations from County health officials about harm allegedly caused by Plaintiffs' actions). Those are not pleading deficiencies. They factual arguments, based on declarations that cannot be judicially noticed for their truth.

Pimentel does not support the County Defendants either as it "affirmed that the $63 [parking] ticket [at issue in that case] was not excessive at the summary judgment stage, with the benefit of full discovery into the plaintiff's culpability and harm, the relation of the ticket to other crimes, and alternatives to the fine." *Navarro v. City of Mountain View*, No. 21-cv-05381-NC, 2021 WL 5205598, at *4 (N.D. Cal. Nov. 9, 2021). Recently, Judge Cousins refused the government's request "to apply *Pimentel's* fact-specific holding without the benefit of developed evidence." *Id.* This Court should too.

C. The County Retaliated Against Plaintiffs for Challenging the $2.8 Million Fine.

The Court should also deny the County Defendants' motion to dismiss Plaintiffs' First Amendment retaliation claim and their claim to hold the County itself liable for damages under *Monell*. County's Mot. at 9-11.

First Amendment Retaliation. "To bring a First Amendment retaliation claim, the plaintiff must allege that (1) it engaged in constitutionally protected activity; (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) the protected activity was a substantial motivating factor in the defendant's conduct—*i.e.*, there was a nexus between the defendant's actions and an intent to chill speech." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (cleaned up).

The seventh cause of action alleges that, "[a]s of December 2020, Plaintiffs CCSJ and Pastor McClure were involved in several legal actions against the County, including this case." TAC, ¶ 144. It alleges that, while those actions were pending, "County officials, instructed by Mr. Williams, sent threatening letters to Cass Bank," which held a mortgage on CCSJ's property. *Id.*, ¶ 145. The complaint also alleges that Mr. Williams and his colleagues did this "to pressure Cass Bank to declare a default that would cost CCSJ hundreds of thousands of dollars … to punish CCSJ and Pastor McClure for defying the COVID-19 orders and to pressure them to drop their legal actions." *Id.* Other portions of the TAC contain additional details about these actions. *Id.*, ¶¶ 85-89. These allegations are more than enough to state a claim for First Amendment retaliation.

Instead of attacking this claim on its face, the County Defendants argued that it is barred by the *Noerr-Pennington* doctrine and California state law privileges. They are wrong. The *Noerr–Pennington* doctrine provides that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). Unlike the government official who filed an eminent domain action in *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638 (9th Cir. 2009), Mr. Williams was not petitioning the government when he sent the threatening letters to Cass Bank. He was contacting a private party to get leverage in a separate legal proceeding. That is a key distinction. Courts have made clear that "government actors are only protected by *Noerr–Pennington* if they engage in activity that is properly considered petitioning or sufficiently related to petitioning activity." *Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1159 (E.D. Cal. 2017) (quotations omitted). And "[t]he Ninth Circuit has generally not interpreted *Noerr–Pennington* to extend immunity to state actors engaging with private entities who are themselves exercising petitioning rights." *Id.*

Mr. Williams' actions do not fall within the narrow definition of government petitioning activity. Furthermore, words only "fall [] under the [*Noerr-Pennington*] doctrine if the speech is protected by the First Amendment." *Hoffman v. Dewitt Cty.*, 176 F. Supp. 3d 795, 809 (C.D. Ill. 2016). Thus, in *Hoffman*, a federal judge in the Northern District of Illinois refused to apply the *Noerr-Pennington* doctrine to dismiss a claim brought against a government lawyer because the lawyer's "alleged act was not an effort to petition the board for a certain result but, rather, was his professional advice on legal issues …." 176 F. Supp. 3d at 810. The same reasoning applies here.

Neither section 821.6 of the California Government Code nor section 47 of the California Civil Code apply either. Prosecutorial immunity protects a government lawyer from liability for injuries "caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Cal. Gov. Code § 821.6. But "the Ninth Circuit, applying the law of California's highest court, has rejected section 821.6 immunity outside of malicious prosecution claims." *Ugorji v. Cty. of Lake*, No. 4:20-CV-01448-YGR, 2020 WL 3639647, at *11 (N.D. Cal. July 6, 2020). Similarly, "[s]tatements to nonparticipants in the action are generally not privileged under section 47(b) …." *Rothman v. Jackson,* 49 Cal. App. 4th 1134, 1141 (1996). The litigation between the County Defendants and Plaintiffs did not involve Cass Bank. Therefore, the bank letters are not absolutely privileged.

In any event, these state law privileges are affirmative defenses that must be raised and proved by a preponderance of the evidence. The opportunity for fact gathering is critical in this context. First Amendment retaliation claims turn on an objective inquiry: would the defendant's actions deter a person of ordinary firmness from engaging in First Amendment-protected activity? That "question is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person." *Garcia v. City of Trenton*, 348 F.3d 726, 728-29 (8th Cir. 2003). Although courts have disagreed about what parts of the claim can be decided on summary judgment versus trial, *see, e.g.,* Petition for a Writ of Certiorari, *Mulligan v. Nichols*, No. 16-1053, at 15-17 (U.S. Mar. 1, 2017), a plaintiff who sets forth a *prima facie* claim for retaliation must have a fair chance to gather evidence to prove its claim.

This analysis might change if the County had already obtained a judgment against Plaintiffs and sent the letters to Cass Bank as part of its collection efforts. But it did not have a judgment. Plaintiffs

had disputed the fines and sued to invalidate them, facts that Mr. Williams omitted from the letters and that, once revealed, caused the bank to withdraw the default notice. TAC, ¶¶ 85-87. Thus, the County's admission that it sent the letters to coerce Plaintiffs into dropping their legal challenges and paying the disputed fines is *prima facie* evidence of retaliatory intent. This claim must proceed to discovery.

Monell. To state a *Monell* claim, the plaintiff "must demonstrate that an official policy, custom, or pattern on the part of the [government] was the actionable cause of the claimed injury." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1167, 1170 (9th Cir. 2012) (cleaned up). This can be done when the challenged action stems from "an expressly adopted policy" or when "the individual who committed the constitutional tort was an official with final policymaking authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it." *Estate of Osuna v. Cty. Of Stanislaus*, 392 F. Supp. 3d 1162, 1172 (E.D. Cal. 2019) (cleaned up). The TAC alleges that the County's unlawful retaliation stemmed from an expressly adopted policy and that the retaliation was directed or ratified by Mr. Williams, the County Counsel. TAC, ¶ 151. Thus, the Motion's discussion of *Monell's* "custom" prong is irrelevant. The County Defendants can be held liable for violating Plaintiffs' constitutional rights because the people who violated those rights were final policymakers acting pursuant to an official County policy.

D. None of Plaintiffs' Claims Against the County Defendants Are Moot.

Plaintiffs' claims are not moot. Mootness requires a change of policy which, at minimum, "is evidenced by language that is broad in scope and unequivocal in tone." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). Courts do not find a matter moot where a new policy "could be easily abandoned or altered in the future." *Id.*

The County Defendants' comment about being unlikely to issue similar health orders is not an official policy but a statement made by a government lawyer in a pleading. And it is not broad in scope or unequivocal in tone. To the contrary, the TAC alleges that "County Officials still believe that they have the power to ban indoor religious activities if they decide it is necessary to protect public health." TAC, ¶ 8. They did not deny that allegation.

Furthermore, a live controversy exists as to the $2.8 million fine the County levied against the Plaintiffs, which Plaintiffs have challenged both under the First/Fourteenth Amendments and the Eighth

Amendment. TAC, ¶¶ 83 n. 1, 99-123. Plaintiffs seek to enjoin the County from enforcing the fine and seek a declaratory judgement that the fines and health orders they are predicated on are unconstitutional. *Id.*, at p. 28:1-2. That claim is not moot unless the County dismisses the fines. The TAC also seeks damages under the First Amendment retaliation doctrine, *Monell* and the Excessive Fine Clause. A case that seeks damages cannot be dismissed as moot even if a defendant voluntarily changes its behavior. *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (citing cases). This principle is especially important in civil rights cases. "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Thus, in a civil rights case, even "[a] live claim for nominal damages will prevent dismissal for mootness." *Bernhardt*, 279 F.3d at 872.

No basis for a stay. The County Defendants did not formally request a stay under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). In any event, the Supreme Court "has carefully limited *Colorado River*, emphasizing that courts may refrain from deciding an action for damages only in exceptional cases, and only the clearest of justifications support dismissal." *R.R. Street & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978 (9th Cir. 2011) (quotations omitted). For example, the Supreme Court has found abstention to be inappropriate, even though a state court suit involving the same claims was filed first, because "the federal suit did not increase the risk of piecemeal litigation; substantial progress had already been made in the federal suit; federal law provided the rule of decision on the merits of the case; and there was substantial doubt as to whether the state court could issue the remedy sought in federal court." *Id.* (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 19 (1983)).

That is the case here. This action was filed first. It challenges the legality of the County Defendants' actions primarily under federal law. The claims should be decided in federal court. That is why the parties have been litigating in this Court for months. The County Defendants' belated, and procedurally improper, request to stay the action to avoid discovery should be denied.

V. CONCLUSION

Plaintiffs respectfully request that this Court deny the County's motion to dismiss. In the alternative, Plaintiffs request leave to amend, should they need to cure any pleading defects.

Dated: December 17, 2021

Respectfully submitted,

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