No. _____

In the Supreme Court of the United States

CALVARY CHAPEL SAN JOSE, AND MIKE MCCLURE,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, AND SARA H. CODY, M.D., IN HER OFFICIAL CAPACITY AS HEALTH OFFICER FOR THE COUNTY OF SANTA CLARA,
Respondents.

On Petition for Writ of Certiorari to the
California Court of Appeal, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At issue in this case is the ability of government to referee religious services in a house of worship.

Government officials in California imposed COVID rules governing any "business," which was defined to include churches. These rules – governing such matters as social distancing, masking, and capacity ceilings – contained multiple exemptions, but did not allow Petitioners Calvary Chapel San Jose and Pastor Mike McClure to conduct religious services in accord with their religious beliefs. County officials sought injunctive relief and contempt sanctions for the church's noncompliance (both of which were overturned in prior proceedings), then sought nearly three million dollars in fines. The state courts upheld fines in excess of a million dollars. The four questions presented are:

1. Do COVID restrictions that contain multiple exceptions, exceptions permitting comparable risks of viral transmission, trigger strict scrutiny under *Employment Division v. Smith*, 494 U.S. 872 (1990), because they are not "generally applicable"?

2. Should this Court hold that the church autonomy doctrine, which provides an exception to *Smith*, includes not just a "ministerial exception" but also a "liturgical exception"?

3. If *Smith* does *not* require strict scrutiny in this case and does *not* include a liturgical exception, but instead allows governments to micromanage religious services, should this Court overrule *Smith* as incompatible with a proper reading of the Free Exercise Clause?

4. Is the imposition of over a million dollars in fines on a church for its adherence to its religious requirements for worship services a violation of the Excessive Fines Clause of the Eighth Amendment?

CORPORATE DISCLOSURE STATEMENT

Petitioner Calvary Chapel San Jose has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Superior Court of California, County of Santa Clara:

People of the State of California v. Calvary Chapel San Jose, No. 20CV372285 (Santa Clara Cnty. Super. Ct.) (Apr. 7, 2023) [order granting summary adjudication]

People of the State of California v. Calvary Chapel San Jose, No. 20CV372285 (Santa Clara Cnty. Super. Ct.) (Feb. 6, 2024) [order granting unopposed motion to set aside dismissal of entire case and dismissing second cause of action with prejudice]

People of the State of California v. Calvary Chapel San Jose, No. 20CV372285 (Santa Clara Cnty. Super. Ct.) (Feb. 6, 2024) [judgment]

Court of Appeal of California, Sixth Appellate District:

People v. Calvary Chapel San Jose, Nos. H048708, H048734, H048947 (Aug. 15, 2022) [decision]

People v. Calvary Chapel San Jose, No. H051860 (Apr. 15, 2025) [decision]

People v. Calvary Chapel San Jose, No. H051860 (May 6, 2025) [rehearing denial]

Supreme Court of California:

People v. Calvary Chapel San Jose, No. S291092 (June 30, 2025) [briefing order]

People v. Calvary Chapel San Jose, No. S291092 (July 16, 2025) [review denied]

U.S. District Court:

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Nov. 5, 2020)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Dec. 18, 2020)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Sept. 27, 2021)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Nov. 12, 2021)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Mar. 18, 2022)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (May 26, 2022)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (VKD) (Aug. 18, 2022)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (VKD) (Aug. 19, 2022)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (VKD) (Sept. 7, 2022)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Oct. 6, 2022)

Calvary Chapel San Jose v. Cody, No. 20-cv-03794-BLF (Mar. 10, 2023)

U.S. Court of Appeals for the Ninth Circuit:

Calvary Chapel San Jose v. County of Santa Clara, No. 23-15445 (June 1, 2023)

Calvary Chapel San Jose v. County of Santa Clara, No. 23-15445 (Apr. 12, 2024)

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JURISDICTION

The judgment of the California Court of Appeal was entered on April 15, 2025. That court denied rehearing on May 2, 2025. Pet. App. E. The Supreme Court of California denied a timely petition for review on July 16, 2025. On September 30, Justice Kagan extended to December 13, 2025, the time for filing a petition for certiorari. *Calvary Chapel San Jose v. California*, No. 25A366. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

U.S. CONST. amend. I.

The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

INTRODUCTION

A government's prohibition of worship services, or dictating how such rituals are to be conducted, is something one would expect from the Soviet Union or Communist China. Government suppression of or interference with religious worship is anathema to American principles of religious liberty enshrined in the Constitution. Yet Respondents did exactly that in this case. Respondents sought – and obtained from the California state courts – more than a million dollars in fines to punish Petitioners for refusing to subject their religious worship to government micromanagement. But imposing massive fines on a house of worship and its pastor for following their

faith-based tenets governing religious rituals, especially when the government allows multiple secular exemptions to its restrictions, violates both the Free Exercise Clause and the Excessive Fines Clause. This Court should grant review.

STATEMENT OF THE CASE

While this case has an extended litigation history, the facts relevant to this petition are straightforward.

Respondent Santa Clara County imposed draconian restrictions related to the COVID pandemic, but those restrictions were riddled with exceptions.[1] Among other things, these restrictions told churches how to run their religious services. "Relevant here, the public health orders included orders restricting indoor gatherings and requiring face coverings, social distancing, and submission of a social distancing protocol by businesses, including churches." *People v. Calvary Chapel San Jose*, 82 Cal. App. 5th 235, 240 (2022) (*CCSJ I*) (Pet. App. 94a).[2]

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1 *See infra* pp. 6-11.

2 As the Superior Court noted,

> A "Business," . . . is defined by the Urgency Ordinance as "any for-profit, nonprofit, or educational entity, whether a corporate entity, organization, partnership, or sole proprietorship, and regardless of the nature of the service, the function it performs, or its corporate or entity structure." Calvary is a domestic non-profit corporation operating a church . . . and thus qualifies as a "business" under the Urgency Ordinance.

Petitioners Calvary Chapel San Jose and its senior pastor Mike McClure (hereafter collectively "Calvary Chapel" or "CCSJ") objected to those restrictions on religious grounds and did not comply. The County sought and obtained an *injunction* and then *contempt* sanctions against the church for its noncompliance, but – in light of this Court's rulings in other cases involving COVID restrictions on churches – the California Court of Appeal reversed, holding that the injunction was unconstitutional, "void," and incapable of supporting contempt sanctions. *Id.* at 258-59, 262 (Pet. App. 126a-127a, 132a).

> We agree with Calvary Chapel that, as we have discussed, under the most recent [U.S.] Supreme Court rulings the prohibition on indoor gatherings in the November 24, 2020 modified restraining order and the preliminary injunction that effectively prohibited indoor worship services, while allowing certain secular indoor activities to occur, is unconstitutional on its face as a violation of the free exercise clause.

Id. at 262 (Pet. App. 132a).

But that did not stop the County. Instead, the County pursued *fines* against Calvary Chapel for failure to comply with the restrictions. The County sought fines in excess of $2.8 million in state court and obtained a final judgment of $1,228,700 in fines.

Order Granting Plaintiffs' Mot. for Sum. Adjudication (Super Ct. Apr. 7, 2023) [Super. Ct. Sum. Adjud.] at 4 (citations omitted) (Pet. App. 53a).

People v. Calvary Chapel San Jose, 2025 Cal. App. Unpub. LEXIS 2244 at *16, *29 (Apr. 15, 2025) (*CCSJ II*) (Pet. App. 13a, 23a).[3] Calvary Chapel appealed, but the California Court of Appeal affirmed the fines, *id.* at *60 (Pet. App. 48a), and denied rehearing, Pet. App. D. The Supreme Court of California denied discretionary review, Pet. App. E, and Calvary Chapel now seeks review in this Court.

In upholding the $1,228,700 in fines, the lower court committed the following federal constitutional errors: First, California's court of appeal held that the restrictions were generally applicable despite the numerous exceptions. Second, the very notion that government can dictate the details of religious worship is wholly inconsistent with the right to the Free Exercise of religion. While this argument was not available under the test of *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court should now take the opportunity to hold that church autonomy under the First Amendment protects not just the selection of ministerial personnel (the "ministerial exception") but also the conduct of liturgy itself. Finally, the imposition of more than a million dollars in fines on a church for adhering to its religious beliefs governing its worship and liturgy violates the Excessive Fines Clause.

Here are the details.

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3 Respondents also seek over a million dollars in attorney fees and costs against Calvary Chapel and Pastor McClure. That request is currently stayed. Order (Superior Court Sept. 15, 2025) (vacating attorney fees hearing pending disposition by U.S. Supreme Court of this petition for certiorari).

1. Public Health Orders and Exemptions

From February 3, 2020, through June 21, 2021, the County issued various orders concerning COVID-19 safety measures that conflicted with Calvary Chapel's religious beliefs and practices.[4] *CCSJ II*, 2025 Cal. App. Unpub. LEXIS 2244 at *2-*7 (Pet. App. 2a-5a). These orders regulated various matters such as public gatherings, distancing, and face coverings. *Id.* at *37-*43 (Pet. App. 31a-35a). The restrictions, however, included multiple exemptions. For example, the County's October 10, 2020 mandatory directive for collegiate and professional athletics stated: "Athletes and officials may remove their face coverings . . . while they are actively engaged in athletic activity." *Id.* at *47 (Pet. App. 37a-38a). (Picture wrestlers, football linemen, and basketball players huffing and puffing in very close proximity to each other.)

As the state court of appeal recited, the "October 5, 2020 revised risk reduction order required face coverings to be worn as specified in the state's June

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4 Calvary Chapel's religious objections to the restrictions are uncontested. *See, e.g.,* McClure Decl. (Cal. Super. Ct. Jan. 10, 2023) (¶6: "The Church's religion requires it meet in person for the teaching of God's Word, prayer, worship, baptism, communion, and fellowship."; ¶12: "The face-mask mandate enforced from July 2020 through May 2021 also conflicted with the Church's religious beliefs. The Church believes that Christians are to approach God with unveiled faces, beholding the glory of the Lord, and being transformed into the same image from one degree of glory to another, as outlined in 2 Corinthians 3:18."). *See also* Pet. App. 54a (Super Ct. Sum. Adjud. at 4-5).

18, 2020 guidance for the use of face coverings,"[5] *id.*at *38 (Pat. App. 31a), and that state guidance in turn contained multiple exceptions:

> "The following individuals are exempt from wearing a face covering: [¶] **Persons age two years or under.** These very young children must not wear a face covering because of the risk of suffocation. [¶] **Persons with a** medical

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5 Per the court, *id.* at *38-*39 (Pet. App. 31a-32a):

> The June 18, 2020 state guidance states: "People in California must wear face coverings when they are in the high-risk situations listed below: [¶] Inside of, or in line to enter, any indoor public space; [¶] Obtaining services from the healthcare sector in settings including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank; [¶] Waiting for or riding on public transportation or paratransit or while in a taxi, private car service, or ride-sharing vehicle; [¶] Engaged in work, whether at the workplace or performing work off-site, when [¶] Interacting in-person with any member of the public; [¶] Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time; [¶] Working in any space where food is prepared or packaged for sale or distribution to others; [¶] Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities; [¶] In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance; [¶] Driving or operating any public transportation or paratransit vehicle, taxi, or private car service or ride-sharing vehicle when passengers are present. When no passengers are present, face coverings are strongly recommended. [¶] While outdoors in public spaces when maintaining a physical distance of [six] feet from persons who are not members of the same household is not feasible." (Fns. omitted.)

condition, mental health **condition**, or disability **that prevents wearing a face covering.** This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance. [¶] **Persons** who are hearing impaired, or communicating with a person who is hearing impaired, **where the ability to see the mouth is essential for communication.** [¶] **Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.** [¶] **Persons who are obtaining a service involving the nose or face** for which temporary removal of the face covering is necessary to perform the service. [¶] **Persons who are seated at a restaurant** or other establishment that offers food or beverage service, **while they are eating or drinking**, provided that they are able to maintain a distance of at least six feet away from persons who are not members of the same household or residence. [¶] **Persons who are engaged in outdoor work or recreation** such as swimming, walking, hiking, bicycling, or running, when alone or with household members, and when they are able to maintain a distance of at least six feet from others. [¶] **Persons who are incarcerated.** Prisons and jails, as part of their mitigation plans, will have specific guidance on the wearing of face coverings or masks for both inmates and staff."

Id. at *38-*40 (Pet. App. 32a-33a) (emphases added). The California Court of Appeal also referenced the May 18, 2021 safety measures order, which provided: "All persons must follow the health officer's mandatory directive on use of face coverings." *Id.* at *41 (Pet. App. 33a).[6] That order likewise included a laundry list of exceptions:

> "The following specific settings are exempt from face covering requirements: [¶] Persons in a car

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6 The court of appeals quoted further, id. at *41-*42 (Pet. App. 33a-34a):

> The mandatory directive on use of face coverings, effective May 19, 2021, stated that "[a]ll residents, businesses, and governmental entities must follow the California Department of Public Health's guidance for use of face coverings . . . issued on May 3, 2021." (Some capitalization omitted.) The California Department of Public Health's (CDPH) May 3, 2021 guidance for use of face coverings stated: "1. For fully vaccinated persons, face coverings are not required outdoors except when attending crowded outdoor events, such as live performances, parades, fairs, festivals, sports events, or other similar settings. [¶] 2. For unvaccinated persons, face coverings are required outdoors any time physical distancing cannot be maintained, including when attending crowded outdoor events, such as live performances, parades, fairs, festivals, sports events, or other similar settings. [¶] 3. In indoor settings outside of one's home, including public transportation, face coverings continue to be required regardless of vaccination status, except as outlined below. [¶] 4. As defined in the CDPH Fully Vaccinated Persons Guidance, fully vaccinated people can: [¶] Visit, without wearing masks or physical distancing, with other fully vaccinated people in indoor or outdoor settings; and [¶] Visit, without wearing masks or physical distancing, with unvaccinated people (including children) from a single household who are at low risk for severe COVID-19 disease in indoor and outdoor settings." (Boldface & italics omitted.)

> alone or solely with members of their own household, [¶] Persons who are working alone in a closed office or room, [¶] **Persons who are obtaining a medical or cosmetic service involving the nose or face** for which temporary removal of the face covering is necessary to perform the service, [¶] Workers who wear respiratory protection, or [¶] **Persons who are specifically exempted from wearing face coverings by other CDPH guidance.** [¶] The following individuals are exempt from wearing face coverings at all times: [¶] **Persons younger than two years old.** Very young children must not wear a face covering because of the risk of suffocation. [¶] **Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering.** This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance. [¶] **Persons** who are hearing impaired, or communicating with a person who is hearing impaired, **where the ability to see the mouth is essential for communication.** [¶] **Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by** local, state, or federal **regulators** or workplace safety guidelines."

Id. at *40-*43 (Pet. App. 34a) (emphases added; parenthetical omitted).

In sum, the COVID restrictions denied religious worship comparable treatment in at least the

following respects: the restrictions had exceptions (1) for *medical* reasons but not for *religious* reasons, *compare Holt v. Hobbs*, 574 U.S. 352, 367-68 (2015) (prison allowed beards for medical reasons but not for religious reasons); (2) for engaging in *sports*, including *contact sports*, but not for engaging in *praise and worship*; (3) where needed to *communicate* but not where needed to *worship* in accord with one's beliefs; (4) where government officials determined in their *discretion that extending an exemption* was warranted, though no such exception was afforded to houses of worship; (5) to engage in *services* involving the viewing or use of the face, but not to participate in *religious services* that may involve the face, such as Communion; (6) for persons gathered for a *meal* but not persons gathered for a *commemoration of the Last Supper, a seder, or other religious ritual*; (7) for outdoor *work or recreation*, but not outdoor *religious services*; (8) when in a *prison*, but not in a *church*.

2. TRO/Injunction Action, Contempt Sanctions, and Reversal on Appeal

The unconstitutionality of allowing exceptions to government restrictions for *secular*, but not *religious*, reasons is not a new concept. This Court has already signaled the unconstitutionality of many COVID public health orders for precisely such disparate treatment. *See Tandon v. Newsom,* 593 U.S. 61 (2021); *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14 (2020); *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom,* 141 S. Ct. 716 (2021); *Gish v. Newsom,* 141

S. Ct. 1290 (2021); *Gateway City Church*, 141 S. Ct. 1460 (2021).

Indeed, in this very case, the state court of appeal held unconstitutional and "void" – in light of this Court's rulings – restrictions being imposed on Calvary Chapel. *CCSJ I*.

In October 2020, Respondents State, County, and the County health officer (Dr. Cody) sued Petitioners Calvary Chapel and Pastor McClure alleging failure to comply with COVID health orders "'such as avoiding indoor gatherings, wearing face coverings, keeping sufficient physical distance, and avoiding singing or shouting near others while indoors.'" *CCSJ I*, 82 Cal. App. 5th 235, 241 (2022) (Pet. App. 97a (quoting complaint).[7] In response, the

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7 Per the court of appeal, *id*. at 241-42 (Pet. App. 97a-98a):

> The specific public health orders that Calvary Chapel had violated included, according to plaintiffs, the following orders: (1) the County's July 2, 2020 risk reduction order requiring all businesses to submit a social distancing protocol, requiring all persons to maintain a minimum distance of six feet from persons outside their household, requiring all persons within a business (including a church) to wear face coverings unless medically exempt, and imposing limitations on gatherings as subsequently directed by Dr. Cody; (2) Dr. Cody's gatherings directives, as revised from July 8, 2020, through September 8, 2020, that prohibited indoor gatherings that brought "together multiple people from separate households in a single space," such as religious services, and required face coverings for outdoor gatherings unless medically exempt; (3) the State's August 28, 2020 order implementing the "Blueprint for a Safer Economy," a tiered system for modifying public health measures based on COVID-19 test and case rates, which placed the County in the most

trial court granted a temporary restraining order.[8] *Id.* at 243 (Pet. App. 99a-100a). The court followed with a modified TRO and a preliminary injunction. *Id.* at 243-45 (Pet. App. 100a-103a). Respondents sought contempt sanctions against Calvary Chapel for violation of these three orders and obtained sanctions in excess of $200,000. *Id.* at 245-48 (Pet. App. 103a-108a).

> restrictive tier 1 (prohibiting indoor gatherings) prior to September 8, 2020, and then in the less restrictive tier II (imposing capacity limitations on gatherings of 25 percent capacity or 100 persons, whichever was fewer); (4) the County's October 5, 2020 revised risk reduction order, which applied to all activities and sectors and required submission of a social distancing protocol, wearing face coverings at all times (including inside churches), and maintaining six feet of social distance from persons outside one's household; and (5) Dr. Cody's October 13, 2020 revised gatherings directive, which allowed indoor gatherings with a capacity limitation of 25 percent or 100 persons, whichever was fewer, and continued to prohibit indoor singing.

8 Per the court of appeal, *id*. at 243 (Pet. App. 100a):

> The temporary restraining order included in the November 2, 2020 order enjoined Calvary Chapel from "1. Conducting any gathering that does not fully comply with both the State and County public health orders, including but not limited to: holding gatherings indoors in excess of 100 people or 25% of capacity, whichever is less; holding outdoor gatherings in excess of 200 people; allowing participants to attend gatherings without wearing face coverings; allowing participants to attend gatherings without maintaining adequate social distance; and allowing singing at indoor gatherings; [¶] 2. Operating, whether indoors or outdoors, without the prior submission and implementation of a Social Distancing Protocol."

On Calvary Chapel's appeal, however, the state court of appeal held that "the underlying orders which Calvary Chapel violated are void and unenforceable, [so] we will annul the orders of contempt in their entirety and reverse the orders to pay monetary sanctions." *Id.* at 241 (Pet. App. 96a). Pointing to this Court's intervening church COVID cases, the court ruled that the TRO barring

> any indoor gathering that did not comply with the capacity limitations of 100 people or 25 percent of capacity is unconstitutional because it discriminates against a religious institution in violation of the free exercise clause of the First Amendment and the County has not satisfied its burden to show that the underlying health order satisfies strict scrutiny.

Id. at 256 (Pet. App. 121a). The court of appeal held that it "need not determine whether the November 2, 2020 temporary restraining order is unconstitutional with respect to the health order's restrictions on indoor singing and requirements for face coverings, social distancing, and submission of a social distancing protocol." *Id.* at 256 (Pet. App. 121a-122a). As the court explained:

> The trial court did not impose discrete fines for violations of the capacity limitations and the violations of the requirements for social distancing, face coverings, and submission of a social distancing protocol but instead imposed a single, aggregate punishment. We will therefore reverse . . .

Id. (Pet. App. 122a). The court reversed the contempt sanctions for the modified TRO and preliminary injunction under the same rationale. *Id.* at 262 (Pet. App. 132a-133a).

3. Administrative Fines, Enforcement Action, and Appeal

Meanwhile, in July 2021, respondent government entities and health official filed an amended complaint seeking injunctive relief and nearly $3 million in fines for Calvary Chapel's noncompliance with the COVID health orders. *CCSJ II*, 2025 Cal. App. Unpub. LEXIS 2244 at *15-*16 (Pet. App. 12a-13a). Respondents moved for summary adjudication on several of their claims, *id.* at *17 (Pet. App. 14a), and Calvary Chapel opposed the motion, *inter alia*, on the basis of the Free Exercise Clause of the First Amendment and the Excessive Fines Clause of the Eighth Amendment, *CCSJ II*, 2025 Cal. App. Unpub. LEXIS 2244 at *22-*23 (Pet. App. 18a-19a). On April 7, 2023 – *after* the court of appeal had reversed the prior injunctive orders and contempt sanctions – the superior court rejected Petitioners' federal constitutional defenses and ruled for the state and county government, *id.* at *23 (Pet. App. 19a), imposing judgment against Calvary Chapel for over $1.2 million in fines, *id.* at *29 (Pet. App. 23a).[9]

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9 The superior court identified two categories of violation: first, failure to submit a "completed" Social Distancing Protocol (SDP) from Aug. 23 2020 through May 18, 2021; and second, failure to

Calvary Chapel appealed, renewing its objections to the fines under the Free Exercise and Excessive Fines Clauses. *CCSJ II*, 2025 Cal. App. Unpub. LEXIS 2244 at *29-*30 (Pet. App. 24a). This time, the California Court of Appeal affirmed. Despite the variety of exemptions to the COVID orders, *see supra* pp. 6-11, the court held that the restrictions were "of general applicability" under the test of *Employment Division v. Smith*, 494 U.S. 872 (1990). *See CCSJ II,* 2025 Cal. App. Unpub. LEXIS 2244 at *49-*52 (Pet. App. 39a-41a). Or more precisely, the court of appeal held that "Calvary Chapel has not shown" a lack of general applicability, *id.* at *52 (Pet. App. 41a), even though the existence of multiple exemptions was undisputed. As to the Excessive Fines issue, the court of appeal held that Calvary Chapel "intentionally and repeatedly failed to comply" with restrictions that conflicted with its

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require face coverings for congregants and staff, in violation of the November 9, 2020 Notice of Violation (NOV) continuing through the rescission of the face mask requirement on June 21, 2021. Super. Ct. Sum. Adjud. at 3, 16-17, 31 (Pet. App. 52a, 71a, 92a-93a). The superior court declined to impose a fine for the SDP violations, finding them in part unconstitutional, and in part redundant of the face covering fines. *Id.* at 30 (Pet. App. 91a-92a). Moreover, regarding the "face covering fines," the superior court relied exclusively upon the November 9, 2020 NOV. *E.g., id.* at 5, 8-9, 16-17, 31 (Pet. App. 55a, 59a, 71a, 92a-93a). Respondents did not cross-appeal the superior court's rejection of the SDP fines or its disregard of any face mask NOV beyond that of November 9, 2020. Hence, the superior court's judgment rested exclusively upon the accumulated fines, plus interest, for violation of the November 9, 2020 NOV. *Id*. at 31 (Pet. App. 92a-93a. *Accord CCSJ II*, 2025 Cal. App. Unpub. LEXIS 2244 at *2 (Pet. App. 1a). And that is the only violation before this Court.

religious beliefs and therefore the fines were "not grossly proportionate [sic] to Calvary Chapel's culpability." *Id.* at *59 (Pet. App. 47a). The court also perceived the severity of the COVID pandemic as supporting a "high" level of culpability. *Id.* at *59-*60 (Pet. App. 48a).

Calvary Chapel sought rehearing, which the court of appeal denied. Pet. App. D. The Supreme Court of California denied Calvary Chapel's petition for discretionary review. Pet. App. E.

REASONS FOR GRANTING THE PETITION

The government respondents in this case violated the Constitution in multiple respects. This Court should grant review to clarify that restrictions on religious worship services trigger strict scrutiny, under the *Smith* test, where the restrictions are subject to secular exceptions; or, in the alternative, that the church autonomy doctrine shields not just the selection of ministerial personnel but also a religious body's managing of its religious rituals. If *Smith* does not require strict scrutiny or autonomy for religious services, then this Court should overrule *Smith*.

This case also presents the question whether the Eighth Amendment bars as excessive the imposition of million-dollar fines for the refusal to submit to government dictation of the intimate details of religious services.

I. RESTRICTIONS ON RELIGIOUS CONDUCT WITH SECULAR EXCEPTIONS TRIGGER STRICT SCRUTINY UNDER *SMITH*.

In this case, the government respondents imposed restrictions on Calvary Chapel while allowing multiple exceptions for a variety of secular activities. *Supra* pp. 6-11. Under the *Smith* test, this should have triggered strict scrutiny. Yet the California Court of Appeal refused to apply strict scrutiny. Instead, the court below held that "Calvary Chapel has not shown that these secular activities were *comparable* to the church activities that subjected Calvary Chapel to fines for violating the face covering requirements." *CCSJ II* at *49 (Pet. App. 39a) (emphasis added).

But as detailed at length above, the raft of secular exceptions were indeed comparable. *Supra* pp. 6-11. Moreover, the court below, in applying a demanding test for comparability, departed from this Court's teachings.

The assessment of a restriction's general applicability does not entail merely a comparison of the *activities* as such, but rather a comparison of the *risk* to the government interest (here, the spread of COVID):

> [W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. [*Roman Catholic Diocese of Brooklyn*,] 141 S. Ct. [at] 67 (per curiam)

> (describing secular activities treated more favorably than religious worship that either "have contributed to the spread of COVID-19" or "could" have presented similar risks). Comparability is concerned with the risks various activities pose, not the reasons why people gather. *Id.*, at ___, 141 S. Ct. 63, 79 (Gorsuch, J., concurring).

Tandon, 593 U.S. at 62. "A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). That analysis suffices here to trigger strict scrutiny. *See supra* p.11. The COVID virus does not care whether the mask is off (1) for *medical* or *religious* reasons; (2) for *intense sports* or for *intense prayer*; (3) to *communicate* or to *worship*; (4) pursuant to government *discretion* or not; (5) to engage in *facial services* or *religious services*; (6) for a *meal* or a *religious ritual*; (7) for outdoor *work or recreation* or outdoor *religious services*; (8) in a *prison*, or in a *church*. For that matter, the virus does not care if the breathing person is age two or under. *But cf. supra* pp. 7, 10 (exempting those age two or younger from masking requirement).

In short, the California Court of Appeal badly distorted the *Smith* test for "general applicability," to the detriment of religious freedom in the core area of freedom to worship. This Court should grant review.

II. THIS COURT SHOULD RECOGNIZE THE RIGHT OF RELIGIOUS BODIES TO DIRECT THEIR RELIGIOUS SERVICES AS PART OF THE CHURCH AUTONOMY DOCTRINE.

More fundamentally, this Court should hold that the church autonomy doctrine under the First Amendment Religion Clauses includes a right not to have government dictate the parameters of religious services. This Court has already recognized the right of religious bodies to select their own ministers. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012). The rationale for this *ministerial* exception to the *Smith* test applies with equal if not greater force to a *liturgical* exception to *Smith*. The lower courts were not free to recognize such an exception. This Court should grant review and do so.

Smith itself nodded to the essentiality of religious rituals to the free exercise of religion. 494 U.S. at 877-78 ("It would doubtless be unconstitutional, for example, . . . to prohibit bowing down before a golden calf"). And previously, this Court had recounted in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*):

> Intolerable persecutions throughout history led to the Framers' firm determination that *religious worship* -- both in *method* and belief -- must be *strictly protected from government intervention*.

Id. at 93 n.127 (emphasis added). *See also Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) ("the Constitution's authors sought to protect religious worship from the pervasive power of government").

In *Hosanna-Tabor*, this Court observed that the Puritans came to New England to "establish their own modes of worship" without interference from "the national church," i.e., the authority of the regime. 565 U.S. at 182. And indeed the very spirit of the American Experiment and the Constitution renders anathema the notion of government refereeing the conduct of religious services, throwing penalty flags for mask or distancing violations – exactly the authority Respondents claim to possess.

The principles underlying the ministerial exception likewise apply to a liturgical exception. The conduct of worship and other religious services represents an "internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. *Accord Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) ("This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their *autonomy with respect to internal management decisions that are essential to the institution's central mission*") (emphasis added). Indeed, if anything qualifies as "essential to the institution's central mission," it is the conduct of worship itself. For most religious bodies, worship services constitute their *raison d'être*. While hiring decisions affect *how* a religious institution pursues its mission, liturgical decisions often represent that mission *itself*.

Recognizing a liturgical exception to *Smith* under the church autonomy doctrine would provide crucial freedom of religious bodies from government monitoring of religious rituals. To be sure, this would not be a *carte blanche* for criminal acts contrary to legitimate police power. Child sacrifice, for example, as homicide remains homicide, regardless of one's theology. But government micromanagement of such matters as health protocols would be constitutionally off the table, whether it be a ban on circumcisions, *e.g.*, AP, "Iceland eyes banning most circumcisions" (Feb. 26, 2018), or masking and distancing requirements for churchgoers, as here. And with a liturgical exception, there would be no more second-guessing by courts as to what *really* matters in a worship service. *Compare* Super. Ct. Sum. Adjud. at 29 ("It should appear clear to all—regardless of religious affiliation—that wearing a mask while worshiping one's god and communing with other congregants is a simple, unobtrusive, giving way to protect others while still exercising your right to religious freedom.").

Importantly, the government can always seek to educate the public with its advice on healthier living and avoidance of risks. And congregants are free to attend or not attend a house of worship that observes (or not) such government advice, or to take personal measures as they see fit.[10] But government dictation

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10 The record below reflects Calvary Chapel's approach as relying upon congregants to make their own judgments about measures for marginal risk reduction. As the superior court noted, "Calvary contends masks were made available and there was ample space in the church to permit social distancing[;]

of the rules for religious rituals is the hallmark of totalitarian governments,[11] not the United States of America.

III. IF *SMITH* AUTHORIZES GOVERNMENT BODIES TO REFEREE RELIGIOUS SERVICES, THIS COURT SHOULD OVERRULE *SMITH*.

As explained above, petitioner Calvary Chapel has at least two alternative routes under the Free Exercise Clause to relief from respondents' interference with its religious services. First, the exceptions to the COVID restrictions show a lack of general applicability, which takes this case out of *Smith* and into strict scrutiny. Second, in the alternative, this Court should recognize a doctrine of "liturgical exception" as it did in recognizing a "ministerial exception." Both clergy and liturgy rest at the heart of religious exercise and should receive maximum protection under the Free Exercise Clause.

Should this Court conclude, however, that *Smith* neither countenances strict scrutiny here nor allows

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there is no dispute that at least during each of these services, baptisms and prayer meetings, attendees were not required to wear face coverings or to socially distance, and that none of these activities was held outside." Super. Ct. Sum. Adjud. at 5 (Pet. App. 54a-55a).

11 *See, e.g.,* Tom Phillips, "China's crusade to remove crosses from churches 'is for safety concerns,'" *The Guardian* (July 29, 2015) ("crosses have been stripped from the roofs of more than 1,200 Chinese churches . . . 'for the sake of safety and beauty', a government official has claimed"); Jonah McKeown, "China's new 'Smart Religion' app requires faithful to register to attend worship services," *EWTN UK* (Mar. 7, 2023).

for a liturgical exception, then *Smith* would stand for the proposition that government can, in the name of "health," prescribe the details of religious services. If that is so, then *Smith* is fundamentally incompatible with religious freedom and should be overruled.

Members of this Court have regularly criticized *Smith*. *City of Boerne v. Flores*, 521 U.S. 507, 565 (1997) (O'Connor, J., joined by Blackmun, J., dissenting) ("I remain of the view that *Smith* was wrongly decided . . . If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would . . . put our First Amendment jurisprudence back on course . . ."); *Fulton v. City of Philadelphia*, 593 U.S. 522, 545 (2021) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring) ("*Smith* . . . is ripe for reexamination."); *id.* at 543 (Barrett, J., joined by Kavanaugh, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause — lone among the First Amendment freedoms — offers nothing more than protection from discrimination.").

Scholars, too, have hammered *Smith*. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1 (2016); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 629 (2003); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1115 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never*

Filed, 8 J.L. & Relig. 99, 102 (1990). These scholars have documented *Smith*'s errors and demonstrated its inconsistency with the text, history, and structure of the First Amendment.

State courts have likewise eschewed *Smith*'s approach when construing their respective state constitutions, which elucidate the meaning of our Constitution. *E.g., Att'y Gen. v. Desilets*, 636 N.E.2d 233, 235-36 (Mass. 1994); *State v. Mack*, 249 A.3d 423, 441 (N.H. 2020). *See also* Nathan Moelker, *Fulton's Answer: State Constitutional Rejections Of Employment Division v. Smith As A Practical Model For The Restoration Of The Free Exercise Clause*, 18 Liberty U. L. Rev. 191 (2023) (collecting cases).

This case powerfully illustrates the ongoing damage *Smith* inflicts on religious freedom. Here, government officials imposed over a million dollars in fines on a church for conducting worship services according to the *church's* religious beliefs rather than *government* diktat. The church faces massive financial punishment, not for harming anyone, but for refusing to allow bureaucrats to superintend its liturgy — as Respondents have done. Over the course of the pandemic, Respondents dictated how many congregants may attend a service, whether they must wear masks, whether they can sing, and how far apart they must stand. *Smith* forces religious believers into submission to government micromanagement of liturgical matters, with their only defense being a discrimination claim where the government's ukase contains some secular exemptions.

As the COVID pandemic demonstrated, *Smith*'s framework leaves religious practice uniquely vulnerable during times of crisis when government

power expands most dramatically. While this Court intervened in several cases to prevent the worst abuses, the underlying *Smith* framework limited the terms of such interventions and left countless other religious communities without recourse.

The *Smith* decision has caused trouble enough. It is time for this Court either to modify or discard it.

IV. FINING A HOUSE OF WORSHIP $1.2 MILLION FOR CONDUCTING RELIGIOUS SERVICES THAT PRIORITIZE TENETS OF FAITH OVER DRACONIAN GOVERNMENT COVID PROTOCOLS VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

This Court's Excessive Fines cases are few in number and largely undeveloped. Indeed, it seems it was not until 1998 that this Court first struck down a fine as excessive. *United States v. Bajakajian*, 524 U.S. 321, 344 (1998) (Kennedy, J., dissenting) ("For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment"). The need for guidance for lower courts applying the Excessive Fines Clause therefore provides an additional reason to grant review.

The penalties the government imposed on Calvary Chapel violate the Eighth Amendment's Excessive Fines Clause as being "grossly disproportionate" to the alleged offenses in question.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. "The purpose of the Eighth

Amendment . . . was to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993) (citation omitted). As this Court said in *Timbs v. Indiana*, 586 U.S. 146, 149-50 (2019):

> Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition."

This protection exists "[f]or good reason," *id.* at 153: "Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies." *Id.* Here, Calvary Chapel chose not to "get with the program" when that program entailed acting inconsistently with its religious beliefs. While standing up for one's beliefs may come with a price, under the Excessive Fines Clause that price may not be a disproportionately crushing fine.[12]

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality," *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Hence, "[i]f the amount of the [penalty] is grossly disproportional to the gravity of

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12 By contrast, the fine imposed in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), for failure to get vaccinated against smallpox, was five dollars (2025 equivalent of $184.08, according to the CPI Inflation Calculator).

the defendant's offense, it is unconstitutional." *Id.* at 337.

Here, Calvary Chapel stood up resolutely for its religious beliefs. As the church phrased it in its briefing below,

> while Calvary Church did continue to operate in violation of the ordinances, it was not out of ill will, but because it believed, and still believes, it has a constitutional right to meet in person, gather in group*s* larger than 25 people, sing, perform communion, and worship without masks.

Appellants' Reply Br. at 20 (Cal. Ct. App. Dec. 6, 2024). And as it turns out, subsequent history has, to a great extent, vindicated the church: in *CCSJ I*, the California Court of Appeal voided the initial injunctions and contempt orders imposed on the church. Meanwhile, this Court repeatedly overturned similar restrictions imposed on other churches, *see supra* p. 12. The county, however, brooking no departure from its prescribed COVID regimen, levied well over a million dollars in fines on Calvary Chapel. That response was "grossly disproportional."

To determine whether a fine is constitutionally excessive, this Court has looked to such considerations as the culpability of the defendant and harm to the government's interests. *Bajakajian*, 524 U.S. at 338-39. Both considerations weigh in favor of Calvary Chapel.

A. Culpability was minimal

As in *Bajakajian*, the defendants had "a minimal level of culpability." *Id.* at 339. The underlying conduct involved the exercise of fundamental constitutional rights: holding religious services while declining to enforce masking and distancing requirements (and restrictions on singing) that conflicted with the church's understanding of its religious obligations. As discussed above, while the church violated county orders, it did so based on a good-faith assertion of its religious liberty. Despite that conclusion, the Court of Appeal determined that "the undisputed facts show that Calvary Chapel's level of culpability due to violating the public health orders requiring face coverings is high, and therefore the fines in the amount of $1,228,700 do not violate the excessive fines clause," *CCSJ II*, 2025 Cal. App. Unpub. LEXIS 2244, at *60 (Pet. App. 48a). This presents a unique and troubling scenario: punishing conduct as highly culpable when that conduct consisted of refusing to comply with orders that (1) conflicted with religious beliefs and (2) overlapped heavily with prior restrictions which had been invalidated.

The Court of Appeal in *CCSJ I* -- the contempt case -- refused to parse out which specific violations were tied to unconstitutional provisions versus possibly constitutional ones. Instead, the court held that "the trial court did not impose discrete fines for violations of the capacity limitations and the violations of the requirements for social distancing, face coverings, and submission of a social distancing protocol but instead imposed a single, aggregate

punishment. We will therefore reverse . . .” *CCSJ I*, 82 Cal. App. 5th at 256 (Pet. App. 122a). The same aggregation problem exists here. The $1.2 million in fines stem from a course of conduct — holding religious services in a manner that did not fully comply with county orders — that was substantially intertwined with restrictions subsequently declared void. [13] The capacity limitations were void. The prohibition on singing was part of orders declared void. And the masking requirements were enforced as part of the same overall regulatory scheme. Culpability for noncompliance with a scheme that is at least partially and arguably completely unconstitutional cannot be “high.”

B. Harm was minimal

The harm to the government “was also minimal.” *Bajakajian*, 524 U.S. at 339. As noted earlier, *supra* pp. 6-11, the county restrictions allowed exemptions for a host of activities that, so far as the COVID virus was concerned, were just as open to viral transmission as the activities Calvary Chapel undertook. Any marginal harm to efforts to stem COVID spread would be both minimal and, indeed,

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13 Indeed, the November 9, 2020 NOV – the basis of the fines here, *see supra* note 9 -- *expressly* required Calvary Chapel, *inter alia*, to comply with the TRO of November 2, 2020. *See* Nov. 9, 2020 NOV at 3 (“You must immediately comply with the Public Health Orders and the November 2 TRO”). Yet the court of appeal subsequently held that same TRO to be unconstitutional and “void.” *CCSJ I* at 243, 255-56, 258 (Pet. App. 99a-100a, 120-122a, 125a-126a).

incalculable. The County admitted as much. [14] Stamping out the possibility of some incremental harm is not a constitutional justification for hammering a house of worship with a multi-million dollar fine.

* * *

Standing up for one's beliefs against government prescriptions has a long and venerable tradition in this country, a tradition running through such iconic figures as the children in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (refusing to pledge allegiance), and the automobile owners in *Wooley v. Maynard*, 430 U.S. 705 (1977) (refusing to display "Live Free or Die" motto on license plate). Government *overreactions* to such principled noncompliance, by contrast, constitute shameful episodes in our history. *E.g.,* "The Civil Rights Act of 1964: A Long Struggle for Freedom," Library of Congress, (video of forceful responses to civil rights protesters in Birmingham in 1963).[15]

The Excessive Fines Clause "guards against abuses of government's punitive or criminal-law-enforcement authority." *Timbs*, 586 U.S. at 149. The County violated that constitutional provision in this case. This Court should grant review to clarify for the

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14 As noted in Calvary Chapel's brief in the Court of Appeal, Appellants' Opening Brief at 35 (Aug. 5, 2024), "Dr. Sarah Rudman testified on behalf of the County that it was difficult, if not impossible, to determine the source of COVID-19 transmission, including at Calvary's services. (5CT 1431:2-15.)"

15 https://www.loc.gov/exhibits/civil-rights-act/multimedia/birmingham-protests.html

lower courts that the Excessive Fines Clause applies to government overreach in its efforts to exact total obedience to health protocols against assertions of constitutional rights, especially protocols of at best marginal utility.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDICES:

APPENDIX A

PEOPLE v. CALVARY CHAPEL SAN JOSE

Court of Appeal of California,
Sixth Appellate District

April 15, 2025, Opinion Filed

H051860

Opinion by: Danner, J.

I. INTRODUCTION

Appellant Calvary Chapel San Jose is a domestic, nonprofit corporation that operates a church located in San Jose. Appellant Mike McClure is Calvary Chapel's senior pastor (collectively, Calvary Chapel). Respondents the State of California, the County of Santa Clara (County), and Sara H. Cody, M.D. (collectively, the People) brought an action against Calvary Chapel to collect administrative fines of over $2 million that the County had imposed on Calvary Chapel for violating certain public health orders requiring face coverings and submission of a social distancing protocol, which the County had issued to slow **[*2]** the spread of the COVID-19 virus.

The trial court granted the People's motion for summary adjudication of the collection action, ruling that the appropriate amount of administrative fines that Calvary Chapel owed for its undisputed refusal to comply with the public health orders' face covering requirements from November 9, 2020, through June 21, 2021, was $1,228,700, and entered judgment in the People's favor.

On appeal, Calvary Chapel contends that the trial court erred in granting the People's motion for summary adjudication and the judgment must be reversed because (1) the public health orders at issue violate the free exercise clause of the First Amendment (U.S. Const., 1st Amend.); (2) the County violated due process in imposing the administrative fines; and (3) the fines violate the excessive fines clause of the Eighth Amendment (U.S. Const., 8th Amend.) For the reasons stated below, we find no merit in Calvary Chapel's contentions and affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Since the issues on appeal arise solely from Calvary Chapel's violation of certain public health orders requiring face coverings, our summary of the factual and procedural background will focus on those orders.

A. *Public Health Orders and Urgency Ordinance*

On February 3, 2020, the County declared **[*3]** that COVID-19, a highly contagious viral disease, was a local health emergency. The County issued the shelter in place orders of Sarah Cody, M.D. (Dr. Cody), the County's Public Health Officer, from March 2020 through June 2020 for the purpose of slowing the spread of the COVID-19 virus in the community. These public health orders were revised over time to allow limited resumption of business and outdoor activities as the spread of COVID-19 slowed.

By July 2020, the County determined that the public health orders relating to COVID-19 would transition from a shelter in place model to a harm reduction

model. On July 2, 2020, the County issued Dr. Cody's risk reduction order that superseded the previous shelter in place orders. Effective July 13, 2020, the July 2, 2020 risk reduction order applied to all individuals, businesses, and entities in the county and required face coverings to be used inside any business facility or while using public transportation. Businesses were also required to submit an online social distancing protocol to the County that stated their compliance with the safety measures required by the July 2, 2020 order. The County included churches in the definition of **[*4]** "business" in the July 2, 2020 risk reduction order, which states: "For purposes of this [o]rder, a 'business' includes any for-profit, non-profit, or educational entity, whether a corporate entity, organization, partnership, or sole proprietorship, and regardless of the nature of the service, the function it performs, or its corporate or entity structure. For clarity, 'business' also includes a for-profit, non-profit, or educational entity performing services or functions under contract with a governmental agency."

To authorize enforcement of these and other COVID-19 public health orders, on August 11, 2020, the County's board of supervisors adopted Urgency Ordinance No. NS-9.921 (Urgency Ordinance). The Urgency Ordinance stated that "[f]ailure to comply with any of the of the public health orders, . . . constitutes an imminent threat and menace to public health and is a public nuisance. The purpose of this ordinance is to facilitate efficient and widespread enforcement of the public health orders to control the spread of COVID-19 and mitigate its impacts." (Some capitalization omitted.)

The Urgency Ordinance also provided that County enforcement officers were authorized to determine **[*5]** whether the public health orders had been violated and to issue notices of violation. The Urgency Ordinance included a schedule of administrative fines for violations of the public health orders and set forth the procedure for appeal of the administrative fines to a hearing officer.[1]

On October 5, 2020 the County issued Dr. Cody's revised risk reduction order, which superseded the previous risk reduction order. Regarding face coverings, the revised risk reduction order provided in part that "[f]ace coverings must be worn at all times and by all individuals as specified in the California Department of Public Health's mandatory guidance for the use of face coverings . . . and in accordance with any specific directives issued by the county health officer." (Some capitalization omitted.) The June 18, 2020 guidance for the use of face coverings stated that persons were required to wear face coverings in specified high risk situations, including "[i]nside of, or in line to enter, any indoor public space." The revised risk reduction order also required all businesses to

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[1] Government Code section 53069.4, subdivision (a)(1) provides: "The legislative body of a local agency, . . . may by ordinance make any violation of any ordinance enacted by the local agency subject to an administrative fine or penalty. The local agency shall set forth by ordinance the administrative procedures that shall govern the imposition, enforcement, collection, and administrative review by the local agency of those administrative fines or penalties. Where the violation would otherwise be an infraction, the administrative fine or penalty shall not exceed the maximum fine or penalty amounts for infractions set forth in [s]ection 25132 and subdivision (b) of [s]ection 36900."

submit an online social distancing protocol, in which the business stated their compliance with the public safety measures, **[*6]** including the face covering requirements.

The revised risk reduction order was later superseded when the County issued Dr. Cody's May 18, 2021 safety measures order. Regarding face coverings, the safety measures order stated: "All persons must follow the health officer's mandatory directive on use of face coverings." (Capitalization omitted.) The mandatory directive on use of face coverings, effective May 19, 2021, stated that "[a]ll residents, businesses, and governmental entities must follow the California Department of Public Health's guidance for use of face coverings . . . issued on May 3, 2021." (Underscoring & some capitalization omitted.) The California Department of Public Health's May 3, 2021 guidance for the use of face coverings required, among other things, that face coverings be worn inside, except in one's home. (Some capitalization omitted.) The guidance for the use of face coverings also included exceptions for specified individuals, such as persons alone in a car or for whom wearing a face covering would create a work-related risk.

Thereafter, on June 21, 2021, the County issued Dr. Cody's phase out order, which rescinded the previous safety measures order with certain **[*7]** exceptions due to the decline in COVID-19 cases and widespread community vaccination. The phase out order clarified that all individuals and entities were still required to comply with state orders and mandatory guidance by the State Department of Public Health, and specifically required businesses to require all

personnel who were not fully vaccinated to comply with the mandatory directive on face coverings.

B. *Administrative Proceedings*

1. August 23, 2020 Notice of Violation

The County issued a notice of violation dated August 23, 2020, to Calvary Chapel for, among other things, failure to submit a social distancing protocol as required by the public health orders. The fines imposed in the notice of violation included a fine of $250 per day for failure to submit and implement a social distancing protocol, failure to post a social distancing protocol, and failure to train staff on implementing a social distancing protocol. The notice of violation also stated that the fines would begin accruing after a 48-hour grace period and would double each day until corrected, to a maximum fine of $5,000 per day.

The fines imposed on Calvary Chapel for failure to submit a social distancing protocol **[*8]** accrued from the August 23, 2020 notice of violation to May 18, 2021, when the requirement of a social distancing protocol was rescinded by the County.

2. Administrative Hearing and Order

Calvary Chapel appealed the notices of violation of public health orders that the County had issued from August 23, 2020, through October 18, 2020, and also appealed the fines in the amount of $327,750 that the County had imposed for those violations, to the County hearing officer pursuant to the appeal procedure provided by Urgency Ordinance.

The notices of violation at issue included a September

2, 2020 notice of continuing violation and imposition of fines. The identified violations included Calvary Chapel's failure to require everyone attending, performing, or speaking at Calvary Chapel's services to wear face coverings and failure to submit a social distancing protocol.

On October 21, 2020, the County hearing officer held a hearing at which the County presented witness testimony, documentary evidence, and video evidence. Calvary Chapel did not present any evidence. The hearing officer stated that Calvary Chapel's constitutional challenges to the public health orders were barred from consideration **[*9]** at the hearing by the provisions of the Urgency Ordinance, and therefore the public health orders and Urgency Ordinance would be presumed to be constitutional.

In his written administrative decision, dated November 2, 2020, the County hearing officer found that Calvary Chapel did not dispute that it had violated all 10 public health orders as alleged by the County; that Calvary Chapel had failed to require everyone attending, performing, or speaking at Calvary Chapel's services to wear face coverings; and that Calvary Chapel had failed to submit a social distancing protocol. The County hearing officer also found that Calvary Chapel had intentionally failed to comply with the public health orders.

The County hearing officer therefore denied Calvary Chapel's appeal and upheld the fines imposed in the amount of $327,750. The administrative decision also advised Calvary Chapel of its right to seek review by the superior court.

3. November 9, 2020 Notice of Violation

After the administrative hearing was held in October 2020 the County issued a notice of violation dated November 9, 2020, to Calvary Chapel that stated, among other things, that Calvary Chapel had violated the County's October **[*10]** 5, 2020 revised risk reduction order by (1) failing to require the use of face coverings by clients, customers, and visitors when they were in an indoor space open to the public; and (2) failing to require the use of face coverings by all personnel, including employees, owners, contractors, and volunteers at the facility.

The November 9, 2020 notice of violation also stated the fines that were imposed on Calvary Chapel for violating the revised risk reduction order's face covering requirements. Due to Calvary Chapel's repeated violations and refusals to comply with the public health orders after receiving a cease and desist letter and 12 previous notices of violation, the County imposed fines of (1) $1,000 per day for failing to require the use of face coverings by clients, customers, and visitors when in an indoor space open to the public; and (2) $1,000 per day for failing to require the use of face coverings by all personnel, including employees, owners, contractors, and volunteers at the facility.

Further, the November 9, 2020 notice of violation stated that the fines would begin accruing immediately and double each day until the face covering violations were corrected, up to a maximum **[*11]** of $5,000 per day. To correct the violations, Calvary Chapel was ordered to immediately comply with the public health orders and (1) "Require all attendees and congregants

to wear face coverings while attending gatherings or while indoors in a space open to the public;" and (2) "Require all personnel to wear face coverings while attending gatherings or while indoors in a space open to the public." (Boldface omitted.) Correction also required Calvary Chapel to submit a sworn statement attesting to compliance, which Calvary Chapel did not do.

The November 9, 2020 notice of violation also informed Calvary Chapel of the procedure to appeal the violations identified in the notice of violation and the fines imposed. However, Calvary Chapel did not appeal the November 9, 2020 notice of violation to the County hearing officer.

4. Appeal to Superior Court and Order

On November 23, 2020, Calvary Chapel filed an appeal in the superior court from the County hearing officer's November 2, 2020 decision to uphold the fines in the amount of $327,750. In its pretrial brief, Calvary Chapel asserted its right to argue on appeal that the public health orders were unconstitutional although constitutional **[*12]** issues could not be raised in the administrative hearing. In its constitutional challenge, Calvary Chapel argued that the fines imposed for violation of the public health orders should be reversed because the free exercise clause of the First Amendment was violated by the public health orders' restrictions on gatherings and by the requirement that it submit a social distancing protocol that included compliance with unconstitutional safety measures.

In the April 8, 2021 order, the superior court affirmed the administrative decision. (*Calvary Chapel San Jose*

v. Cnty. of Santa Clara, Super. Ct. Santa Clara County, 2020, No. 20CV374470, 2020 U.S. Dist. LEXIS 259504.) At the outset, the superior court rejected the County's argument that Calvary Chapel could not raise constitutional issues on appeal. The superior court determined that Calvary Chapel could raise on appeal from the administrative decision its constitutional challenges to the public health orders and the Urgency Ordinance.

Addressing Calvary Chapel's contention that the public health orders and the Urgency Ordinance violated its right to the free exercise of religion under the First Amendment, the trial court stated: "This court will assume for argument's sake that even the capacity limitations applicable to secular essential services and the singing ban which [Calvary Chapel] appears **[*13]** to have violated on every Sunday identified in the operative [n]otices of [v]iolation may be deemed unconstitutional as applied to [Calvary Chapel] by the United States Supreme Court. But no court has relieved [Calvary Chapel] of its obligation to comply with the requirements of face coverings and physical distancing. And [Calvary Chapel] makes no attempt to claim that the indoor gathering ban cannot be treated as severable. [Citations.] A clear majority of the [United States] Supreme Court has deemed it significant to the easing of restrictions on indoor worship that these rudimentary measures for mitigating risk indoors 'are in routine use in religious services across the country today.'"

Having reviewed the administrative record and additional evidence submitted by the parties, the superior court found that Calvary Chapel

"acknowledges that 'it has been holding indoor services without enforcing social distancing or mask wearing.'" The trial court rejected Calvary Chapel's contention that the fines in the amount of $327,750 for its undisputed violations of the public health orders were excessive, finding that the amount of the fines had been insufficient to incentivize Calvary Chapel **[*14]** to comply with "rudimentary hygiene requirements."

Calvary Chapel filed a notice of appeal from the trial court's April 8, 2021 order in this court. This court issued an order to show cause why the appeal should not be dismissed as taken from a nonappealable order. (*Calvary Chapel San Jose v. County of Santa Clara*, case No. H049096.) In response, on June 25, 2021, Calvary Chapel filed a notice of abandonment of the appeal.

C. *The Amended Complaint*

In July 2021 the People filed an amended complaint seeking injunctive relief and the recovery of administrative fines. Previously, when the original complaint was the operative pleading, the People had obtained restraining orders compelling Calvary Chapel to comply with the COVID-19 public health orders, which Calvary Chapel also violated. The People then initiated contempt proceedings against Calvary Chapel due to the violations of court orders. The trial court issued two orders against Calvary Chapel and its pastors, the December 17, 2020 and the February 16, 2021 orders of contempt and to pay monetary sanctions.

Calvary Chapel sought review of the contempt orders and monetary sanctions in this court. In three cases,

People v. Calvary Chapel (Aug. 15, 2022, H048708), *Calvary Chapel San Jose v. Superior Court* (Aug. 15, 2022, H048734) and *McClure v. Superior* **[*15]** *Court* (Aug. 15, 2022, H048947)[2] (collectively, *Calvary Chapel*), this court annulled the December 17, 2020 and the February 16, 2021 orders of contempt, and reversed the orders to pay monetary sanctions.

In *Calvary Chapel*, this court concluded that the temporary restraining orders and preliminary injunctions were facially unconstitutional with respect to the restrictions on indoor gatherings, pursuant to the then recent guidance of the United States Supreme Court regarding the First Amendment's protection of the free exercise of religion in the context of public health orders that impact religious practice (see, e.g., *Tandon v. Newsom* (2021) 593 U.S. 61 (*Tandon*).) However, in *Calvary Chapel* this court assumed, without deciding, that the restraining orders were not facially unconstitutional with respect to the public health orders' requirements for face coverings, social distancing, and submission of a social distancing protocol.

In the July 2021 amended complaint (hereafter, the complaint), the People alleged that Calvary Chapel's ongoing refusal to comply with any of the state and County public health orders intended to protect the public from COVID-19 posed a major health risk to the public. The People further alleged that Calvary Chapel had ignored **[*16]** 70 notices of violation of the public

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[2] On the court's own motion, we ordered case Nos. H048708, H048734, and H048947 to be considered together for purposes of oral argument and disposition.

health orders despite having knowledge of COVID-19 illness and death among its congregants and a large COVID-19 outbreak in the school associated with Calvary Chapel, which warranted injunctive relief and the imposition of administrative fines.

Regarding the administrative fines, the People asserted that, among other fines, Calvary Chapel had incurred fines in the total amount of $2,234,000 for its failure to require face coverings by its congregants and personnel between November 9, 2020, and June 21, 2021. Additionally, due to Calvary Chapel's failure to submit a social distancing protocol between August 2020 and May 18, 2021, the People asserted that Calvary Chapel owed fines in the total amount of $1,327,750. However, in the exercise of prosecutorial discretion the People reduced the total amount of administrative fines owed by Calvary Chapel for violation of the public health orders and sought judgment in the total amount of $2,868,616.67, plus late fees.

Based on these and other allegations, the People asserted causes of action for (1) public nuisance per se; (2) public nuisance (Civ. Code, § 3479); (3) violation of state and county public health orders; (4) **[*17]** violation of the Urgency Ordinance; and (5) violation of Government Code section 25132, subdivision (a) (county authorized to prosecute violation of Urgency Ordinance).[3]

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[3] Government Code section 25132, subdivision (a) provides: "Violation of a county ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a county (continued...)

In addition to injunctive relief and an award of administrative fines in the amount of $2,868,616.67, the People sought staff costs and attorney fees.

D. *Motion for Summary Adjudication*

The People moved for summary adjudication of the first cause of action for nuisance per se, the third cause of action for violation of state and county public health orders, the fourth cause of action for violation of the Urgency Ordinance, and the fifth cause of action for violation of Government Code section 25132, subdivision (a). The basis of the motion was the People's contention that it was undisputed that Calvary Chapel had violated COVID-19 public health orders by refusing to require Calvary Chapel personnel and church attendees to wear face coverings and by refusing to submit a completed social distancing protocol.

Regarding the first cause of action for nuisance per se, the People contended that summary adjudication should be granted because the Urgency Ordinance expressly declared that violation of the public health orders was a nuisance. As to the third cause of action for violation of state and county public health **[*18]** orders, the People argued that summary adjudication should be granted because it was undisputed that Calvary Chapel had violated the public health orders requiring face coverings and submission of a social distancing protocol.

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[3] (...continued)
ordinance may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action."

Similarly, the People argued that summary adjudication of the fourth cause of action for violation of the Urgency Ordinance and the fifth cause of action for violation of Government Code section 25132, subdivision (a) should be granted because it was undisputed that Calvary Chapel had violated the public health orders requiring face coverings and submission of social distancing protocol, thereby violating the Urgency Ordinance.

Anticipating Calvary Chapel's constitutional arguments in opposition to the motion for summary adjudication, the People maintained that these arguments lacked merit as a matter of law. First, the People rejected the argument that the public health orders requiring face coverings violated the free exercise clause, stating: "The revised risk reduction order—which formed the basis of the face covering fines at issue here—also required that all individuals wear face coverings in indoor public spaces, subject to limited context-specific exceptions for the very young, those with medical conditions or disabilities, **[*19]** or while actively eating and drinking if socially distanced. Far from disfavoring religious activities, the orders impose neutral, generally applicable requirements for all comparable, regulated entities in the county." (Capitalization omitted.) The People also asserted that Calvary Chapel had not raised a constitutional objection to the public health orders requiring submission of a social distancing protocol in this litigation.

Alternatively, as the People elaborated in their reply to Calvary Chapel's opposition to the motion for summary adjudication, the People contended that

Calvary Chapel was barred under the doctrine of collateral estoppel from relitigating its claim that the public health orders requiring face coverings violated the free exercise clause. According to the People, the superior court reached Calvary Chapel's constitutional arguments on appeal from the county hearing officer's decision and ruled that the requirement of a social distancing protocol did not violate the free exercise clause. The People also asserted that "[t]he [c]ourt necessarily decided the constitutionality of the [public health orders requiring] face coverings and sustained the fines because it found that 'no court has relieved [Calvary **[*20]** Chapel] of its obligation to comply with the requirements of face coverings and social distancing.'"

Second, the People argued that the administrative fines imposed on Calvary Chapel were not constitutionally excessive under the Eighth Amendment[4] because (1) the administrative fines imposed for violating the public health orders requiring face coverings and submission of a social distancing protocol were proportional to Calvary Chapel's culpability in blatantly violating the public health orders; (2) the magnitude of the risk of harm—the spread of COVID-19—caused by Calvary Chapel's disregard for the law; (3) the fines imposed were in line with the fines authorized by the COVID-

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[4] "The cruel and unusual punishment clause of the Eighth Amendment states, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' (U.S. Const., 8th Amend.)" (*County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 631, fn. 3, 308 Cal. Rptr. 3d 535.)

19 ordinances of other counties; and (4) Calvary Chapel could not show that it was unable to pay the fines because its net assets in 2021 totaled $12,030,512.30.

E. *Opposition to Motion for Summary Adjudication*

Calvary Chapel contended that summary adjudication could not be granted as requested by the People. First, Calvary Chapel argued that summary adjudication was barred under Code of Civil Procedure section 437c, subdivision (h) because more discovery was needed; specifically, a deposition of the district attorney's office regarding prosecution of private gatherings as well as **[*21]** identification of the person who was supposedly served with the November 9, 2020 notice of violation.

Second, Calvary Chapel argued that its constitutional claims were not barred under the doctrine of issue preclusion because it did not have a full and fair opportunity to litigate the constitutional issues in the administrative proceedings. According to Calvary Chapel, the superior court's review of the administrative decision upholding fines in the amount of $327,750 was limited to the administrative record and the superior court did not allow additional discovery. Further, Calvary Chapel argued that the issues presented in the administrative hearing and this litigation were not identical, since different public health orders regarding masking and the social distancing protocol were at issue. Calvary Chapel also argued that the superior court's decision was not a final judgment on the merits.

Third, Calvary Chapel maintained that summary adjudication of the first cause of action for nuisance per se and third cause of action for violation of state and county public health orders could not be granted because those causes of action were moot since the public health orders have been rescinded. **[*22]**

Fourth, Calvary Chapel contended that summary adjudication could not be granted as to any cause of action because the public health orders requiring face coverings and submission of a social distancing protocol violated the First Amendment since the public orders were not neutral and of general applicability, and therefore these public health orders could not survive strict scrutiny. Calvary Chapel asserted that "[t]he County provided exemptions from the social distancing and mask requirements to construction workers, personal care services, restaurants, youth programs, and athletes competing in sports like basketball, football, and wrestling."

Fifth, Calvary Chapel argued that summary adjudication should be denied because there were triable issues of fact as to the daily fines imposed for violating the face covering requirements since a County enforcement officer did not make daily observations. Calvary Chapel also argued that a triable issue of fact existed as to whether Calvary Chapel's agent, Pastor Carson Atherley, had received personal, e-mail, or mail service of the November 9, 2020 notice of violation.

Finally, Calvary Chapel contended that the administrative fines were unconstitutional because **[*23]** the fines were excessive under the Eighth Amendment; the County discriminated against

Calvary Chapel for holding church services because large maskless gatherings held in homes were not cited; and the fines violated the due process clause because Calvary Chapel did not receive notice of the November 9, 2020 notice of violation and the County arbitrarily enforced the Urgency Ordinance.

F. ***Trial Court Order and Judgment***

In the April 7, 2023 order, the trial court granted the People's motion for summary adjudication after finding no merit in Calvary Chapel's arguments in opposition to the motion.

The trial court rejected Calvary Chapel's argument that summary adjudication could not be granted because more discovery was needed. The trial court ruled that "[d]efendants have . . . had over two years to pursue discovery both here and in the federal action, have consistently maintained that the County's health orders were unconstitutional since the appeal of the administrative proceeding, and obtained several opinions from appellate courts and the U.S. Supreme Court outlining that court's clear views regarding the constitutionality of COVID-19 public health orders (or lack thereof). On this record, there is no good cause for **[*24]** a continuance for further discovery to be conducted; the matter is ripe for summary adjudication."

Addressing the first and third causes of action, the trial court ruled that the People had met their burden on summary adjudication because (1) it was undisputed that Calvary Chapel had violated the public health orders (the revised risk reduction order and the safety measures order) by refusing to require

or enforce the wearing of face coverings during the period face coverings were required and by failing to submit a completed social distancing protocol; and (2) the Urgency Ordinance stated that such violations constituted a nuisance.

As to the fourth and fifth causes of action, the trial court ruled that the People had met their burden on summary adjudication because it was undisputed that Calvary Chapel had violated the Urgency Ordinance by violating public health orders requiring face coverings and the submission of a social distancing protocol, and also because the County was authorized by the Urgency Ordinance and Government Code section 25132, subdivision (a) to bring an action to recover costs, attorney fees, and fines for violation of the public health orders. It was also undisputed, the trial court found, that Calvary Chapel **[*25]** had failed to pay any of the fines imposed for its continuing violations of the public health orders.

The trial court then considered Calvary Chapel's constitutional defenses to the public health orders requiring face coverings and the submission of a social distancing protocol. As a threshold matter, the trial court rejected the People's contention that Calvary Chapel's constitutional defenses were barred by issue preclusion because the superior court had ruled on appeal from the administrative decision that the public health orders did not violate the free exercise clause. The court determined that the constitutionality of the public health orders requiring face coverings and the submission of a social distancing protocol were not "fully addressed" by Calvary Chapel during their appeal of the administrative decision.

However, the trial court found no merit in Calvary Chapel's argument that the public health orders requiring face coverings and the submission of a social distancing protocol violated the free exercise clause of the First Amendment. The trial court ruled these public health orders expressly applied to "'all individuals, businesses, and other entities in the County' [citation] and thus were facially neutral, generally applicable requirements **[*26]** for all comparable, regulated entities in the County."

The trial court was not persuaded by Calvary Chapel's arguments to the contrary that the public health orders were not neutral because "various businesses, such as restaurants, personal care services, athletic activities, and youth programs, were 'exempt' from both the mask and the social distancing requirements." Noting that Calvary Chapel's argument was supported by declarations pertaining to construction workers not wearing face coverings while working and firefighters not wearing face coverings indoors, the trial court found that in the absence of any complaints to the County, this evidence did not show that the County was applying the public health orders differently and instead merely demonstrated that some individuals did or did not comply with the public health orders.

Accordingly, the trial court ruled that Calvary Chapel's evidence failed to show that the County's enforcement officers treated activities comparable to Calvary Chapel's large indoor church services more favorably with respect to the requirements for face coverings and the submission of a social distancing protocol. The trial court also noted that the

United **[*27]** States Supreme Court had recognized face coverings and social distancing requirements as basic public health measures consistent with conducting indoor religious services during the COVID-19 pandemic, citing, among other decisions, *South Bay United Pentecostal Church v. Newsom* (2021) 592 U.S. ___ (*South Bay United*).

The trial court also ruled that the administrative fines imposed by the County on Calvary Chapel due to its continuing violations of the public health orders requiring face coverings and the submission of a social distancing protocol did not violate due process. The court determined that due process required that notice be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,'" and the methods of service authorized by the Urgency Ordinance met that standard. Specifically, the court found that the evidence established the County served the November 9, 2020 notice of violation on Calvary Chapel by conspicuously posting it on a Calvary Chapel building and by personally serving it on an agent of Calvary Chapel who, in addition to other indicia of agency, verbally affirmed that he was authorized to accept service. The trial court also found **[*28]** that Calvary Chapel had failed to establish its claim of arbitrary and discriminatory enforcement of the public health orders with admissible evidence.

Finally, the trial court found no merit in Calvary Chapel's contention that the administrative fines violated the excessive fines clause of the Eighth Amendment. The court found it was undisputed that

(1) Calvary Chapel was culpable because it refused to comply with the public health orders despite knowing that church attendees had contracted COVID-19 and the church school had a major COVID-19 outbreak; (2) there was a relationship between the penalty and the harm caused by Calvary Chapel holding church services in violation of the public health orders that put vulnerable members of the community who could die from contracting COVID-19 at risk; (3) the amount of the fines imposed by the Urgency Ordinance was in line with the fines imposed by other counties' ordinances; and (4) Calvary Chapel was able to pay the fines.

The trial court also ruled that the amount of the administrative fines was not excessive because the cumulative amount was due to Calvary Chapel's continuing refusal to comply with the public health orders. However, the trial court reduced **[*29]** the amount of the administrative fines that Calvary Chapel was obligated to pay. Since the August 23, 2020 notice of violation had been found to be unconstitutional, the trial court subtracted the fines imposed for that violation. The court also subtracted the fines imposed for violating the requirement of submission of a social distancing protocol, determining that the social distancing protocol required face coverings and therefore Calvary Chapel had been fined twice for violating the face covering requirements.

The trial court ruled that the appropriate amount of administrative fines for Calvary Chapel's undisputed refusal to comply with the public health orders' face covering requirements from November 9, 2020, through June 21, 2021, was $1,228,700.

Subsequently, in the February 2, 2024 order, the trial court granted the People's unopposed motion to set aside the People's dismissal of the entire action with prejudice and to dismiss the remaining unadjudicated second cause of action for public nuisance with prejudice. Judgment was entered on February 2, 2024, in favor of the People.

III. DISCUSSION

On appeal, Calvary Chapel contends that the trial court erred in granting the People's **[*30]** motion for summary adjudication because (1) the public health orders requiring face coverings are unconstitutional since the orders violate the free exercise clause of the First Amendment; (2) triable questions of fact exist as to whether the County violated due process; and (3) the fines imposed are excessive and therefore violate the excessive fines clause of the Eighth Amendment. We will begin our evaluation of these contentions with the applicable standard of review.

A. *Standard of Review*

A party may move for summary judgment of an entire action or, in the alternative, summary adjudication of a cause of action. (Code Civ. Proc., § 437c, subds. (a)(1) & (f)(1), (2).) Both motions are "subject to the same rules and procedures." (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819, 44 Cal. Rptr. 2d 56; see Code Civ. Proc., § 437c, subd. (f)(2).)

A plaintiff moving for summary judgment "bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 107 Cal. Rptr.

2d 841, 24 P.3d 493 (*Aguilar*); Code Civ. Proc. § 437c, subd. (p)(1).) "Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall **[*31]** set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc. § 437c, subd. (p)(1).)

In determining whether the parties have met their respective burdens, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra*, 25 Cal.4th at p. 843, fn. omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

"In reviewing a trial court's grant of summary judgment, . . . '"[w]e take the facts from the record that was before the trial court when it ruled on that motion"' and '"""review the trial court's decision de novo."""' (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039, 95 Cal. Rptr. 3d 636, 209 P.3d 963.) The trial court's stated reasons are not binding on the reviewing court, "which reviews the trial court's ruling, not its rationale." (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 498, 60 Cal. Rptr. 3d 11.)

B. *Issue Preclusion*

We will begin our analysis of Calvary Chapel's contentions on appeal with the threshold issue of whether Calvary Chapel's **[*32]** argument that the County's public health orders requiring face coverings violate the free exercise clause of the First Amendment is barred under the doctrine of issue preclusion.

1. The Parties' Contentions

The People contend that under the doctrine of "claim preclusion" Calvary Chapel should not be allowed to relitigate its claim that the public health orders requiring face coverings violated the free exercise clause. According to the People, the superior court necessarily rejected that claim in affirming the administrative decision when the court rejected Calvary Chapel's argument that the requirement of a social distancing protocol was an unconstitutional violation of the free exercise clause, since the face covering requirement was incorporated in the social distancing protocol.

Calvary Chapel responds that the trial court correctly found that issue preclusion did not apply because Calvary Chapel did not have a full and fair opportunity to litigate its constitutional claim since the superior court in the prior matter did not consider its free exercise argument. Calvary Chapel also asserts that it was not able to fairly and fully conduct discovery or develop its constitutional defenses in the prior matter.

2. Analysis

We use the term "'claim preclusion'" to refer to **[*33]**

the doctrine addressing claims that were, or should have been, advanced in a previous suit involving the same parties, and the term "'issue preclusion'" in place of "'direct or collateral estoppel'" to refer to the doctrine barring relitigation of issues that were argued and decided in an earlier suit. (See *Samara v. Matar* (2018) 5 Cal.5th 322, 326, 234 Cal. Rptr. 3d 446, 419 P.3d 924; *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, 189 Cal. Rptr. 3d 809, 352 P.3d 378 (*DKN Holdings*).)

Whether issue preclusion applies to bar relitigation of a particular issue is a question of law. (*Parkford Owners for a Better Community v. Windeshausen* (2022) 81 Cal.App.5th 216, 225, 296 Cal. Rptr. 3d 825.) The California Supreme Court has instructed that "[i]ssue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*DKN Holdings, supra*, 61 Cal.4th at p. 824.) "[I]ssue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at p. 825.) "The party asserting issue preclusion has the burden of establishing the above elements." (*Williams v. Doctors Medical Center of Modesto, Inc.* (2024) 100 Cal.App.5th 1117, 1132, 319 Cal. Rptr. 3d 741.)

We determine that the People have not met their burden to establish as a matter of law that **[*34]** issue preclusion applies because an identical issue was

actually litigated in the prior administrative proceeding. Our Supreme Court has instructed that "[f]or purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. [Citation.] In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding . . .. 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.'" (*Hernandez v. City of Pomona* (2009) 46 Cal. 4th 501, 511-512, 94 Cal. Rptr. 3d 1, 207 P.3d 506 (*Hernandez*).)

Our review of the county hearing officer's November 2, 2020 decision and the trial court's April 7, 2023 order granting summary adjudication shows that different public health orders requiring face coverings and different amounts of fines were litigated in the prior administrative proceeding and the present appeal.

As stated in the County hearing officer's decision, the 10 public health orders that Calvary Chapel challenged in the administrative proceedings were dated August 23, 2020, through October 18, 2020. Calvary Chapel also **[*35]** challenged the fines in the amount of $327,750 that the County had imposed for those violations.

In the present appeal, Calvary Chapel challenges the trial court's ruling that Calvary Chapel violated the public health orders requiring face coverings dated November 9, 2020, through June 21, 2021, and the ruling upholding fines in the amount of $1,228,700 for those violations.

Since the public health orders and fines that were litigated in the prior administrative proceedings are different than the public health orders and fines at issue in the present litigation, we decide that identical factual allegations regarding Calvary Chapel's violations of those orders and the amount of the fines imposed were not "'at stake in the two proceedings.'" (See *Hernandez, supra*, 46 Cal. 4th at p. 512.) We therefore determine that Calvary Chapel's argument that the public health orders requiring face coverings violate the free exercise clause is not barred by the doctrine of issue preclusion.

C. *Violation of the Free Exercise Clause*

Calvary Chapel contends that the trial court erred in ruling that the public health orders requiring face coverings did not violate the free exercise clause of the First Amendment. We will begin our analysis with an overview of the Clause.

1. Free Exercise Clause

"The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides **[*36]** that 'Congress shall make no law . . . prohibiting the free exercise' of religion." (*Fulton v. City of Philadelphia* (2021) 593 U.S. 522, 532.) "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531.) However,

"[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests." (*Id.* at p. 546.)

Addressing a COVID-19 public health order that limited gatherings to three households, the United States Supreme Court emphasized in a per curiam opinion that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." (*Tandon, supra*, 593 U.S. at p. 62.) Although the Supreme Court has not directly addressed face covering requirements in **[*37]** the context of a Free Exercise challenge, in a church's challenge to COVID-19 capacity restrictions Justice Gorsuch described masks as a measure "in routine use in religious services across the country today." (*South Bay United, supra*, 592 U.S. at p. ___ (conc. opn. of Gorsuch, J.).)

More recently, the United States Supreme Court clarified the standard for determining whether a government action violates the free exercise clause: "A government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice.' [Citation.] A policy can fail this test if it 'discriminate[s] on its face,' or if a religious exercise is otherwise its 'object.' [Citations.] A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular

conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.' [Citation.] Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." (*Kennedy v. Bremerton School Dist.* (2022) 597 U.S. 507, 526 (*Kennedy*).)

With this guidance in mind, we next review the text of the face covering requirements in the revised risk reduction order and the safety measures order that are at issue in this appeal.

2. Revised Risk Reduction Order [*38]

The October 5, 2020 revised risk reduction order required face coverings to be worn as specified in the state's June 18, 2020 guidance for the use of face coverings. The June 18, 2020 state guidance states: "People in California must wear face coverings when they are in the high-risk situations listed below: [¶] Inside of, or in line to enter, any indoor public space; [¶] Obtaining services from the healthcare sector in settings including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank; [¶] Waiting for or riding on public transportation or paratransit or while in a taxi, private car service, or ride-sharing vehicle; [¶] Engaged in work, whether at the workplace or performing work off-site, when [¶] Interacting in-person with any member of the public; [¶] Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time; [¶] Working in any space where food is prepared or packaged for sale or distribution to others; [¶] Working in or walking through common

areas, such as hallways, stairways, elevators, and parking facilities; [¶] In any room or enclosed **[*39]** area where other people (except for members of the person's own household or residence) are present when unable to physically distance; [¶] Driving or operating any public transportation or paratransit vehicle, taxi, or private car service or ride-sharing vehicle when passengers are present. When no passengers are present, face coverings are strongly recommended. [¶] While outdoors in public spaces when maintaining a physical distance of [six] feet from persons who are not members of the same household is not feasible." (Fns. omitted.)

The June 18, 2020 state guidance on face coverings also provided exceptions, as follows: "The following individuals are exempt from wearing a face covering: [¶] Persons age two years or under. These very young children must not wear a face covering because of the risk of suffocation. [¶] Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering. This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance. [¶] Persons who are hearing impaired, or communicating **[*40]** with a person who is hearing impaired, where the ability to see the mouth is essential for communication. [¶] Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines. [¶] Persons who are obtaining a service involving the nose or face for which temporary removal of the face covering is

necessary to perform the service. [¶] Persons who are seated at a restaurant or other establishment that offers food or beverage service, while they are eating or drinking, provided that they are able to maintain a distance of at least six feet away from persons who are not members of the same household or residence. [¶] Persons who are engaged in outdoor work or recreation such as swimming, walking, hiking, bicycling, or running, when alone or with household members, and when they are able to maintain a distance of at least six feet from others. [¶] Persons who are incarcerated. Prisons and jails, as part of their mitigation plans, will have specific guidance on the wearing of face coverings or masks for both inmates and staff."

3. Safety Measures Order

Also at issue due to Calvary **[*41]** Chapel's violations is the subsequent May 18, 2021 safety measures order, which provided as follows regarding requirements for face coverings: "All persons must follow the health officer's mandatory directive on use of face coverings." (Capitalization omitted.) The mandatory directive on use of face coverings, effective May 19, 2021, stated that "[a]ll residents, businesses, and governmental entities must follow the California Department of Public Health's guidance for use of face coverings . . . issued on May 3, 2021." (Some capitalization omitted.) The California Department of Public Health's (CDPH) May 3, 2021 guidance for use of face coverings stated: "1. For fully vaccinated persons, face coverings are not required outdoors except when attending crowded outdoor events, such as live performances, parades, fairs, festivals, sports events, or other similar settings. [¶] 2. For unvaccinated persons, face coverings are

required outdoors any time physical distancing cannot be maintained, including when attending crowded outdoor events, such as live performances, parades, fairs, festivals, sports events, or other similar settings. [¶] 3. In indoor settings outside of one's home, including **[*42]** public transportation, face coverings continue to be required regardless of vaccination status, except as outlined below. [¶] 4. As defined in the CDPH Fully Vaccinated Persons Guidance, fully vaccinated people can: [¶] Visit, without wearing masks or physical distancing, with other fully vaccinated people in indoor or outdoor settings; and [¶] Visit, without wearing masks or physical distancing, with unvaccinated people (including children) from a single household who are at low risk for severe COVID-19 disease in indoor and outdoor settings." (Boldface & italics omitted.)

The May 3, 2021 state guidance also included the following exemptions from the face covering requirements: "The following specific settings are exempt from face covering requirements: [¶] Persons in a car alone or solely with members of their own household, [¶] Persons who are working alone in a closed office or room, [¶] Persons who are obtaining a medical or cosmetic service involving the nose or face for which temporary removal of the face covering is necessary to perform the service, [¶] Workers who wear respiratory protection, or [¶] Persons who are specifically exempted from wearing face coverings by other **[*43]** CDPH guidance. [¶] The following individuals are exempt from wearing face coverings at all times: [¶] Persons younger than two years old. Very young children must not wear a face covering because of the risk of suffocation. [¶] Persons with a medical

condition, mental health condition, or disability that prevents wearing a face covering. This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance. [¶] Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication. [¶] Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines." (Boldface & fn. omitted.)

4. The Parties' Contentions

Calvary Chapel contends that the public health orders requiring face coverings are not neutral and of general applicability because (1) the public health orders gave firefighters, government entities, and construction workers individual discretion regarding **[*44]** the use of face coverings; (2) the public health orders "provided exemptions from the social distancing and mask requirements to construction sites, personal care services, restaurants, youth programs, and athletes competing in sports like basketball, football, and wrestling;" (3) the public health orders requiring face coverings cannot survive strict scrutiny because there is no evidence that church services were inherently more dangerous than the exempted secular activities and the face covering requirements substantially burdened Calvary Chapel's religious beliefs that worshipers must gather in person with uncovered faces and lay hands on each other.

The People respond that the trial court did not err in

determining that the public health orders do not violate the free exercise clause because Calvary Chapel has not provided any evidence that the orders' face covering requirements treated comparable secular activities more favorably than Calvary Chapel's large, indoor church services. The People also argue that the trial court correctly ruled that the public health orders did not authorize the government to grant exceptions to the face covering requirements on a case-by-case basis.

Alternatively, the **[*45]** People contend that the public health orders' face covering requirements survive strict scrutiny because it cannot be disputed that the People had a compelling state interest in stemming the spread of COVID-19. Further, the People argue that Calvary Chapel's assertion that face covering requirements were not narrowly tailored because Calvary Chapel had superior ventilation is insufficient to create a triable question of fact.

5. Analysis

Having reviewed the revised risk reduction order and the safety measures order, we determine that the People have met their burden to establish as a matter of law that the face covering requirements set forth in the orders are neutral and of general applicability, and Calvary Chapel has failed to submit admissible evidence sufficient to create a triable issue of fact.

First, the text of the revised risk reduction order and the safety measures order shows that these orders are neutral because they are not specifically directed at religious practice, do not discriminate on their face, and religious exercise is not the object of the orders.

(See *Kennedy, supra*, 597 U.S. at p. 526.) Calvary Chapel has not provided any admissible evidence to create a triable question of fact regarding facial **[*46]** neutrality.

Second, the revised risk reduction order and the safety measures order are of general applicability with respect to the face covering requirements. There is no language in the text of the orders that "'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,'" or provides "'a mechanism for individualized exemptions.'" (See *Kennedy, supra*, 597 U.S. at p. 526.) The face covering requirements in the revised risk reduction order and the safety measures order that Calvary Chapel violated undisputedly applied to all secular business operating in Santa Clara County, and Calvary Chapel has not challenged the exemptions to face coverings included in these orders.

Moreover, we are not persuaded by Calvary Chapel's argument that these public health orders are not of general applicability due to the exemptions to the face covering requirements that were included in certain other public health orders that Calvary Chapel asserts favor comparable secular activities. Calvary Chapel broadly claims that the face covering requirements did not apply to "to construction sites, personal care services, restaurants, youth programs, and athletes competing in **[*47]** sports like basketball, football, and wrestling." Our review of the citations to the record in support of these claims shows that Calvary Chapel has misstated the purported exemptions.

For example, the County's October 10, 2020 mandatory

directive for collegiate and professional athletics stated the following exemption to the revised risk reduction order's face covering requirements: "Athletes and officials may remove their face coverings, but only while they are actively engaged in athletic activity. [¶] All other persons associated with the program or organization must wear face coverings at all times while at any sports, training, or other facility, whether indoors or outdoors, that is associated with or being used by their athletics program or organization." All persons entering the facilities were also required to wear face coverings.

The exception pertaining to construction sites is similarly more narrow than Calvary Chapel asserts, since the County's July 7, 2020 mandatory directive for construction projects states: "Face coverings must be worn even while working at a construction project unless [] it would create a risk to the person related to their work, in accordance with **[*48]** local, state, or federal workplace safety guidelines." (Boldface omitted.)

The face covering requirements for restaurants, as stated in the County's October 9, 2020 mandatory directive for dining is also more limited than Calvary Chapel asserts, since the face covering exception states: "Customers may remove their face coverings once their food or drinks have been served and may leave them off until they finish their meal, so long as they are not interacting with a server or other staff and remain seated at their table." (Boldface omitted.)

Regarding personal care services, the County's January 25, 2021 mandatory directive for personal services included the following exception to the face

covering requirement, as follows: "Clients may remove face coverings while receiving a personal care service indoors or outdoors that require removal of a face covering . . .. Clients must put their face covering back on as soon as they are able to, and must wear a face covering while waiting for their service, walking to and from the treatment area, visiting the restroom, and at all other times while at the facility."

As to youth programs, the County's October 29, 2020 mandatory directive for programs **[*49]** for children and youth provided exceptions to the face covering requirements only for children under the age of nine and allowed brief removal of face coverings for children and youth experiencing difficulty wearing a face covering.

Having reviewed the very limited exemptions that Calvary Chapel asserts show that the face covering requirements in public health orders are not of general applicability, we decide that Calvary Chapel has provided no evidence to create a triable question of fact regarding general applicability. As we have discussed, these exemptions applied to children, collegiate and professional athletic activity, restaurant customers while eating, construction workers as allowed by workplace safety guidelines, and individuals while undergoing personal services involving the face. Calvary Chapel has not shown that these secular activities were comparable to the church activities that subjected Calvary Chapel to fines for violating the face covering requirements. (See *Tandon, supra*, 593 U.S. at p. 62.) The November 9, 2020 notice of violation states that to correct the violations, Calvary Chapel was ordered to "immediately comply with the public

health orders" and "(1) Require all attendees and congregants **[*50]** to wear face coverings while attending gatherings or while indoors in a space open to the public; and "(2) Require all personnel to wear face coverings while attending gatherings or while indoors in a space open to the public."

Further, we agree with the trial court that Calvary Chapel's evidence regarding construction workers and firefighters not wearing face coverings is not sufficient to create a triable question of fact as to whether the public health orders provided an unconstitutional "'mechanism for individualized exemptions.'" (See *Kennedy, supra*, 597 U.S. at p. 526.) In *Fulton, supra*, 593 U.S. at page 537, the court explained that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude."

In this case, Calvary Chapel has not shown that the public health orders at issue included a formal mechanism for granting individualized exceptions to the face covering requirements. Calvary Chapel relies on the declaration of fire engineer Barry Arata, who states that, although the City of San Jose required firefighters to wear masks, most **[*51]** firefighters did not wear masks indoors. Calvary Chapel also relies on the declaration of William Sheperd, a construction business owner, who states that his workers did not wear masks while digging trenches and operating heavy equipment, and he was not required by the contractor to wear a mask while working as a subcontractor on a project. These declarations, as the

trial court noted, show only that certain individuals chose not to wear face coverings. There is no evidence that the public health orders included a mechanism for the state or County to grant individualized exceptions to the face covering requirements. Therefore, the declarations are insufficient to create a triable question of fact regarding the general applicability of the face covering requirements.

Finally, we note that the although the declarations of the industrial hygiene expert and medical expert submitted by Calvary Chapel in opposition to summary adjudication both dispute the efficacy of face coverings, neither expert opined that Calvary Chapel's ventilation system as a safety measure was equal to wearing face coverings during church services as a defense against COVID-19 infection, and these opinions are therefore **[*52]** insufficient to create a triable question of fact regarding either neutrality or general applicability of the face covering requirements.

Having determined that Calvary Chapel has not shown in opposition to the motion for summary adjudication that triable questions of fact exist as to whether the face covering requirements in the revised risk reduction order and the safety measures order were neutral and of general applicability, we need not determine if the face covering requirements survive strict scrutiny. For these reasons, we reject Calvary Chapel's arguments based on the free exercise clause.

D. *Due Process*

Calvary Chapel contends that the motion for summary adjudication must be denied because (1) triable questions of fact exist as to whether the County gave

Calvary Chapel proper notice of the November 9, 2020 notice of violation and the fines imposed; and (2) triable questions of fact exist as to whether the County's enforcement of the Urgency Ordinance was arbitrary.

1. Service of the November 9, 2020 Notice of Violation

According to Calvary Chapel, triable issues of fact exist as to whether due process was violated because the County's November 9, 2020 notice of violation was served by posting the **[*53]** notice near the entrance to the Calvary Chapel building and by personally serving an unidentified man at the church property. The People respond that due process was satisfied because it is undisputed that the County enforcement officer posted the November 9, 2020 notice of violation near the entrance of the Calvary Chapel building. We agree with the People.

"'"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." [Citation.] Failure to give notice violates "the most rudimentary demands of due process of law."'" (*California Capital Ins. Co. v. Hoehn* (2024) 17 Cal.5th 207, 214, 327 Cal. Rptr. 3d 172, 558 P.3d 590.)

Posting a notice of violation on a conspicuous place on the subject property has been held to satisfy due process. In a case arising from the violation of building standards, the California Supreme Court stated: "By

requiring that any order or notice pursuant to its terms be posted 'in a conspicuous place on the property, [Health and Safety Code] section 17980.6 provides for notice reasonably calculated to apprise the owner and others that the property has been found by the applicable **[*54]** enforcement agency to be in violation of specified building standards and that repair or abatement of the violations is demanded." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 924-925, 76 Cal. Rptr. 3d 483, 182 P.3d 1027 (*City of Santa Monica*).)

In the present case, the Urgency Ordinance provided that notices of violation of the public health orders could be served by several methods, including "[f]or violations involving the use of real property owned or leased by a [r]esponsible [p]arty, by posting the notice in a conspicuous place at the property entrance." This method of service was therefore reasonably calculated to apprise Calvary Chapel of its violations of the County's public health orders. (See *City of Santa Monica, supra*, 43 Cal.4th at pp. 924-925.) Since it is undisputed that the County's enforcement officer posted the November 9, 2020 notice of violation near the entrance of the Calvary Chapel building, due process was satisfied, and it is unnecessary to resolve any factual issues regarding the identity of the man who received personal service of the November 9, 2020 notice of violation.

2. Arbitrary Enforcement

Calvary Chapel also argues that due process was violated because the "County arbitrarily enforced its Urgency Ordinance by imposing continuing and indefinite maximum fines for Calvary's violations of

the Urgency Ordinance, while **[*55]** not imposing the same accrual terms on other repeat offenders." The People argue that no triable question of fact exists regarding the arbitrary imposition of fines because Calvary Chapel did not provide any evidence to support arbitrary enforcement.

"The touchstone of due process is protection of the individual against arbitrary action of government.'" (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845.) Having reviewed the evidence that Calvary Chapel identified on appeal as showing arbitrary enforcement of fine accrual terms, including the deposition testimony of a County enforcement officer and a notice of violation served on a different church, we decide that the evidence does not support Calvary Chapel's assertion that it was the only repeat offender that received a notice of violation with "indefinite accrual" of fines.

Moreover, the Urgency Ordinance clearly states the schedule for the imposition of fines, as follows: "The civil penalty for each violation involving a commercial activity shall be a fine not to exceed five thousand dollars ($5,000). The minimum amount of any such fine shall be two hundred and fifty dollars ($250). Fines imposed for each day of violation involving a commercial activity shall automatically double, **[*56]** up to the maximum amounts set forth above. Each day that the violation occurs after the maximum amount is reached shall be at the maximum amount. A commercial activity shall mean any activity associated with a Business or with a commercial transaction."

We therefore decide there is no merit in Calvary Chapel's argument that the motion for summary

adjudication must be denied based on due process principles.

D. *Excessive Fines*

In granting the People's motion for summary adjudication the trial court ruled that the appropriate amount of administrative fines for Calvary Chapel's undisputed refusal to comply with the public health orders' face covering requirements from November 9, 2020, through June 21, 2021, was $1,228,700. On appeal, Calvary Chapel contends that the trial court erred because the amount of the fines is grossly disproportionate to Calvary Chapel's low level of culpability, and therefore the fines violate the excessive fines clause of the Eighth Amendment. (U.S. Const., 8th Amend.)

"The Eighth Amendment to the United States Constitution states: 'Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted.' (Italics added.) 'The Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments **[*57]** applicable to the States. [Citation.] The Due Process Clause of its own force also prohibits the States from imposing "'grossly excessive punishments.'" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727, 36 Cal. Rptr. 3d 814, 124 P.3d 408 (*R.J. Reynolds*).)

Our Supreme Court in *R.J. Reynolds, supra*, 37 Cal.4th 707 identified four factors relevant to deciding whether a fine is unconstitutionally excessive: (1) the defendant's culpability; (2) the relationship between

the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. (*Id.* at p. 728, citing *United States v. Bajakajian* (1998) 524 U.S. 321, 337-338 (*Bajakajian*).) These four factors govern our analysis of whether the fines of $1,228,700 imposed on Calvary Chapel are excessive because they are "grossly disproportional to the gravity of a defendant's offense." (*Bajakajian*, at p. 334.)

Calvary Chapel asserts that the People failed to show in moving for summary adjudication that the large amount of fines is proportional to Calvary Chapel's culpability for violating the public health orders requiring face coverings. According to Calvary Chapel, its culpability is low because the People provided no evidence to show that Calvary Chapel's violation of the public health orders caused the spread of COVID-19, since no COVID-19 cases were traced back to the church and it is a myth that church services are superspreader events. Further, Calvary **[*58]** Chapel argues that the culpability factor weighs in its favor due to its good faith adherence to its constitutionally protected religious beliefs. Calvary Chapel does not dispute the third and fourth factors in determining whether fines are excessive. (See *R.J. Reynolds, supra*, 37 Cal.4th at p. 728.)

The People respond that the undisputed evidence shows that Calvary Chapel's violation of the public health orders requiring face coverings put its staff, congregants, and the public at a severe risk of contracting COVID-19, including during the time before vaccines were available and hospitalizations and deaths were at their peak. The People therefore argue that the fine amount of $1,228,700 is in

proportion to Calvary Chapel's high level of culpability for its repeated violations of the public health orders.

In reply, Calvary Chapel contends that the trial court erred in imposing excessive fines because there is a triable question of fact as to whether Calvary Chapel violated the public health orders requiring face coverings every day, since the County enforcement officers did not make daily observations of Calvary Chapel.

We decide that there is no triable question of fact on the frequency of Calvary Chapel's violations in light **[*59]** of Calvary Chapel's admission in the proceedings below that it never complied with any of the public health orders requiring face coverings. For example, in his declaration in support of Calvary Chapel's opposition to the People's motion for summary adjudication, Senior Pastor McClure stated: "As the pastor and the shepherd of the [c]hurch, I did not force my congregation to wear masks."

We also determine that the undisputed facts show that fines imposed in this case for Calvary Chapel's violation of the public health orders requiring face coverings are not grossly proportionate to Calvary Chapel's culpability. (See *Bajakajian, supra*, 524 U.S. at p. 334.) Significantly, it is undisputed that Calvary Chapel intentionally and repeatedly failed to comply with any of the public health orders requiring face coverings to be worn during its indoor church services and other indoor activities. The November 9, 2020 notice of violation that is the basis for the fines imposed here stated that fines were imposed on Calvary Chapel for violating the revised risk reduction order's face covering requirements after receiving a

cease and desist letter and 12 previous notices of violation.

Further, it cannot be disputed that COVID-19 is a **[*60]** highly contagious disease that caused severe illness and death during a global pandemic, that Calvary Chapel was aware that some of its congregants had contracted COVID-19 and its school had sustained a serious outbreak, and that the County issued the public health orders requiring face coverings in certain circumstances as part of the County's effort to slow the spread of COVID-19. We therefore determine that the undisputed facts show that Calvary Chapel's level of culpability due to violating the public health orders requiring face coverings is high, and therefore the fines in the amount of $1,228,700 do not violate the excessive fines clause of the Eighth Amendment because the fines are not grossly disproportionate to Calvary Chapel's culpability. (See *Bajakajian, supra*, 524 U.S. at p. 334.)

In conclusion, having found no merit in Calvary Chapel's arguments on appeal, we will affirm the judgment in the People's favor.

IV. DISPOSITION

The February 2, 2024 judgment is affirmed. Costs on appeal are awarded to respondents.

Danner, J.

WE CONCUR:
Greenwood, P. J.
Wilson, J.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA COUNTY OF SANTA CLARA, and SARA H. CODY, M.D., in her official capacity as Health Officer for the County of Santa Clara, Plaintiffs, v. CALVARY CHAPEL SAN JOSE; MIKE MCCLURE, and DOES 1-50, Defendants.	Case No. 20CV372285 ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION; DENYING DEFENDANTS' MOTION TO STAY

Plaintiffs' the People of the State of California, the County of Santa Clara (the "County"), and Dr. Sara H. Cody in her official capacity as Health Officer for the County of Santa Clara's (collectively, "Plaintiffs") motion for summary adjudication against defendants Calvary Chapel San Jose ("Calvary") and Mike McClure ("McClure") (collectively, "Defendants") came on for hearing before the Court on March 14, 2023. Pursuant to California Rule of Court 3.1308, the Court

issued its tentative ruling on March 13, 2023. The parties appeared for argument, and the Court took the matter under submission. Having considered the argument, briefing and relevant case law, the Court now issues its final ruling.

I. Background

A. Factual

Except as noted below, the parties largely agree to the material facts that give rise to this case.

Covid-19 is a contagious disease the outbreak of which led the County to declare a local health emergency on February 3, 2020. (Defendants' Supplemental Response to Plaintiffs' Separate Statement of Undisputed Facts ("DSU") Nos. 1-2.) A month later, on March 4, 2020, Governor Newsom declared a state of emergency, and a week later the President declared a national emergency. (DSU Nos. 3, 4.) The World Health Organization declared Covid-1 a pandemic on March 11, 2020, and experts consider this outbreak the worst public health epidemic since the influenza outbreak of 1918. (Declaration of Sara H. Cody, M.D. In Support of Plaintiffs' Motion for Summary Adjudication ("Cody Decl."), ¶¶ 6-7.)

Santa Clara County is comprised of 15 cities with a population of approximately 1.9 million people. (Cody Decl., ¶ 5.) To address the spread of Covid-19 between and amongst those 1.9 million people, between March 2020 and June 2021, the County Health Officer issued public health orders. (DSU Nos. 5, 15.) These public health orders included:

- July 2, 2020 (effective July 13): Order (County)

Establishing Mandatory Risk Reduction Measures Applicable to All Activities and Sectors to Address the Covid-19 Pandemic (the "Risk Reduction Order"). (DSU Nos. 6, 7).

- This order required, *inter alia*, that all individuals wear face coverings when entering business facilities or using public transportation, and submit a Social Distancing Protocol ("SDP"). The SDP required businesses to attest that they would implement various categories of Covid-19 safety measures, including, but not limited to: (1) training personnel about Covid-19; (2) instituting a process for reporting positive Covid-19 cases to the County; and (3) agreeing to follow any applicable State or County public health orders, guidance, or directives. (DSU No. 28.).

- October 5, 2020: Order of the Health Officer of the County of Santa Clara Establishing Mandatory Risk Reduction Measures Applicable to All Activities and Sectors to Address the Covid-19 Pandemic (The "Revised Risk Reduction Order"), which order superseded the Risk Reduction Order on October 14, 2020. (DSU No. 8, 9).
  - This order required compliance with the California Department of Public Health's ("CDPH") mandatory guidance on face coverings, which required the use of face coverings in *all* indoor public spaces with limited exceptions such as for those with

medical conditions or disabilities, and while actively eating or drinking. The order still required all businesses to submit an SDP.

- May 18, 2021: Order of the Health Officer of the county of Santa Clara Establishing Focused Safety Measures to Protect the Community from Covid-19 (the "Safety Measures Order"). (DSU No. 10.) This superseded the Revised Risk Reduction Order on May 19, 2021. (DSU No. 11).
    - Under this order, businesses were no longer required to submit SDPs, but were required to follow the County's May 18, 2021 Mandatory Directive on Face Coverings (see below).
- May 18, 2021: By the County Health Officer, a Mandatory Directive on Face Coverings. (DSU No. 12).
    - This order required compliance with the May 3, 2021 CDPH mandatory guidance regarding face coverings.
- June 21, 2021: By the County, Order of the Health Officer of the County of Santa Clara Phasing Out the May 18, 2021 Health Order Given Widespread Community Vaccination (the "Phase Out Order"). (DSU No. 13.).
    - This order rescinded the provisions of the May 18, 2021 Order relevant to this case.
- Between June 18, 2020 and May 3, 2021: the California Department of Public Health issued Guidance for the Use of Face Coverings. (DSU

No. 15.)

On August 11, 2020, the County Board of Supervisors adopted Urgency Ordinance No. NS-9.921 (the "Urgency Ordinance"). (DSU No. 14.) This ordinance was adopted to create a comprehensive program to civilly enforce the various public health orders and, as relevant here, did two key things: (1) declared that violations of the State and County public health orders constitute an imminent threat and menace to public health and are therefore a public nuisance; and (2) set a range of fines for violations of public health orders. Civil penalties differed depending on whether the subject violation involved non-commercial versus commercial activities, and the latter was defined to mean "any activity associated with a Business or with a commercial transaction." (Plaintiffs' Request for Judicial Notice ("RJN"), Exhibit 159 at §2(b)(2).) A "Business," in turn, is defined by the Urgency Ordinance as "any for-profit, non-profit, or educational entity, whether a corporate entity, organization, partnership, or sole proprietorship, and regardless of the nature of the service, the function it performs, or its corporate or entity structure." (*Id.*)

Calvary is a domestic non-profit corporation operating a church at 1175 Hillsdale Avenue in San Jose and McClure is its Senior Pastor, and thus qualifies as a "business" under the Urgency Ordinance. (DSU Nos. 16, 17.) Calvary offers many services like marriage and addiction counseling, prayer, women's coffee and teas, men's breakfast, bible studies, and youth ministry programs like Friday night fellowship, summer fun days, and summer and winter camps. (Declaration of Mike McClure in Support of

Defendants Calvary Chapel San Jose's and Mike McClure's Opposition to Plaintiffs' Partial Motion for Summary Adjudication ("McClure Decl."), ¶ 3.) Calvary also has a ministry through its branch, Calvary Christian Academy (the "Academy"), which is located across the street from the church. (McClure Decl., ¶ 2.)

In March 2020, Calvary closed in-person services and contends that in so doing immediately experienced a decline in spiritual, emotional, and mental health amongst its congregants. (McClure Decl. ¶4.) According to its Pastor, Mike McClure, "Fellowship requires the gathering of ALL church member [sic] together in person, as fellowship represents the Body of Christ." (McClure Decl. ¶ 8.) Pastor McClure further cites to Acts 2:42 as an example of what he describes as "the early church"; "And they continued steadfastly in the apostles' doctrine and fellowship, and in breaking of bread, and in prayers." (McClure Decl. ¶ 9; see also *id*. at ¶ 11 ("Hebrews 10:25 exhorts Christians to not give up meeting together, 'as some are in the habit of doing, but encouraging one another – and all the more as you see the Day approaching'".)

Accordingly, Calvary reopened and began holding in-person worship on May 31, 2020. (McClure Decl., ¶ 4.) From that date through May 2021, Calvary held two Sunday services, averaging attendance of 300-500 congregants; prayer gatherings one or twice a week ranging from 2 to 20 attendees; and about 1000 baptisms per year from May 2020 through August 2022. (McClure Decl., ¶¶ 8, 17-18.) Although Calvary contends masks were made available and there was ample space in the church to permit social distancing,

there is no dispute that at least during each of these services, baptisms and prayer meetings, attendees were not *required* to wear face coverings or to socially distance, and that none of these activities was held outside. (See generally McClure Decl., ¶¶ 7, 9-16; see also Declaration of Stephanie Mackey in Support of Plaintiffs' Motion for Summary Adjudication ("Mackey Decl.") and accompanying exhibits; Plaintiffs' Statement of Undisputed Facts ("PSU") Nos. 18, 19.) Defendants' maintain, however, there is no evidence such indoor, unmasked events occurred every day between November 9, 2020 and June 21, 2021, since Defendants did not inspect Calvary's premises every one of those days. (DSU, No. 18.)

Defendants were not only holding these events without masks or social distancing, but were also live streaming and other wise advertising online that they were doing so, sometimes commenting directly on Calvary's dispute with the County over the Public Health Orders. (Mackey Decl. and accompanying exhibits.) For example, on December 13, 2020, Pastor McClure states: "I do applaud you. Thank you, thank you for coming in this dark time. . . to gather together to obey God's word and we're not here to fight the government but to stand for the freedom that God has given us and the right to worship." (Mackey Decl., ¶ 26, Ex. 43.) At several services, Pastor McClure refers to the service as a "protest" (Mackey Decl., ¶ 7, Ex. 8; ¶ 9, Ex. 12; ¶ 17, Ex. 27; ¶ 28, Ex. 48; ¶ 38, Ex. 72), elsewhere he advises that "People are going to do what they want to do, I'm not a policeman . . . ." (Mackey Decl., ¶ 24, Ex. 41.).

There also appear to be at least some services

where Pastor McClure is advising or at least strongly suggesting that his congregants not wear masks or social distance, even if they might get sick and/or die:

> October 11, 2020: "Obviously, you're here today so you don't care if you get sick. No one here, by the way, has gotten sick, gone to the hospital, or died from this thing, by the way. *You're all like, 'I'm ready to die, I don't care, I'm going to church*.'" (Mackey Decl., ¶, Ex. 16 (emphasis added).)
>
> November 22, 2020: "There's all these studies that say look, don't wear your mask when you're exercising, you know, um, [laughs] I think you shouldn't wear 'em when you're, you know, I can't think with them on, that's just me. . . You have a 99.99% chance of not dying if you catch the virus." (Mackey Decl., ¶ 19, Ex. 32.)
>
> January 10, 2020: "You can't tell a Christian not to preach the name of Jesus Christ, or to praise his name, or to gather in his name – the right from God – *And who cares what the cost is . . . .*" (Mackey Decl., ¶ 34, Ex. 61 (emphasis added).)
>
> January 10, 2021: "The third misconception . . . for Christians is that [the world] think[s] they can, like brutalize them or threaten them to get them to do what they want. . . 'Speak no more, teach no more in his name or else we're gonna go after you. Your fines are going to go up to $1.5 million. $80,000 and $23,000 for you personally! And that's what they're doing to me now and it's like, OK, but you know. . . I'm willing to die for the truth. I've died a long time ago. . . . I think about our government's infringement on our liberties. I

think about this whole thing, Covid-19, it's . . .it was all set up. We were played. This whole thing, it's a lie. I mean, not that it's not a disease. But they're using it to take control and to stop you and I from worshipping God. That's what they're doing . . . They're trying to take away our freedom. This is religious persecution in American." (Mackey Decl., ¶ 35, Ex. 65 (emphasis added).)

April 11, 2021: "One of these reporters outside the courthouse . . . one time he says, 'Just tell me, why aren't you wearing a mask?' . . . So, I said, "Well, because *I'm not afraid to die.* But I bet you're wearing yours – and I'm not saying wearing a mask or not wearing a mask-most of the time we're wearing these things because we're afraid to die. We're trying to protect ourselves in any way possible.' And I said, 'Is that true?' And he said, 'Yeah, I would think you would do anything to save your life.' And I said, 'That's where you're wrong with Christians, because *we're told to lose our life.* And if we lose it for Jesus Christ and the sake of the gospel, we will find it.'... *And I can assure you I am not afraid of Covid. I am not afraid of Covid-21, 22, 23 [laughter].*" (Mackey Decl., ¶ 59, Ex. 113) (emphasis added).)

April 25, 2021: "Everyone believes this, you go hide in your houses and quarantine and you need to save yourself. I have often asked myself, 'Why are people so mad if I don't have a mask on?" And I have realized it's because it's not about my safety, it's about their safety. And apparently, their mask isn't enough. I have to have one on even though they have two on! I look and think, there have

> been two Stanford studies that say how bad it is, because you're literally just breathing C02. You're gonna give yourself Covid. It's not good for you. It's just not, it's not healthy to wear a mask all day. If that offends you, let the truth hurt. It's just not good for you . . . It makes us almost moldable so the elites can lead a society that's not thinking clearly because they're not getting enough oxygen [laughter]. . . You know, all of this is being foisted upon us to control us and bring us to the point where we don't trust anybody and anything. . . You see, a lot of what's happening today is witchcraft in our culture. . ." (Mackey Decl., ¶ 63, Ex. 120).

Pastor McClure's comments also suggest that Calvary experienced increased donations as a result of the services reflected in the Exhibits attached to the Mackey declaration. At a March 21, 2021 service, Pastor McClure states: "We had a construction loan of $1.9 million and . . . people all over the country now, who have been watching what's going on here . . . they've sent some money to help us pay down our debt . . . So we had $1.9 million dollars last year in this construction loan . . . and now we're down to under $700,000 today." (Mackey Decl., ¶ 53, Ex. 103.)

Pastor McClure and other Calvary staff testified that between August 2020 and June 2021, staff and attendees of the church contracted Covid-19 and displayed symptoms consistent with the virus. (PSU Nos. 47, 48.) However, Calvary contends that "Plaintiffs cannot trace one Covid-19 case to the church." (DSU Nos. 47-48.) It is undisputed however, that in late December 2020 and early January 2021,

certain students and teachers at the Academy tested positive for Covid-19, and the school was closed for two weeks due to the "aggressive" spread of the virus through the school. (DSU No. 50.) The families of some of the Academy's students and staff attend church at Calvary, although Defendants contend there is no evidence they attended the church during the time they were sick. (DSU No. 51.) Defendants did not report the positive Covid-19 cases to the County, although Defendants appear to argue that they did not make such reports because the cases were not "confirmed". (DSU No. 52.)

As a result of Calvary's activities, on November 9, 2020, the County issued a Notice of Violation ("NOV") to Defendants for failing to require personnel, congregants and visitors to wear face coverings as required by the Revised Reduction Order and the Gatherings Directive. (PSU No. 20.) The NOV included a separate $1,000 fine for each violation. (PSU No. 21.) Under the Urgency Ordinance, each $1,000 fine doubled every day the violations were not corrected up to a maximum of $5,000, and then continued to accrue daily at $5,000 until the violations were corrected. (PSU No. 22.) The violations would be deemed corrected if Defendants submitted a sworn compliance statement confirming correction of the violations noted in the Notice; no such compliance statement was ever submitted. (PSU Nos. 23, 24.)

According to Plaintiffs', Defendants' fines for failing to require personnel or attendees to wear face coverings began accruing on November 9, 2020, and between that date and June 21, 2021, amount to $2,234,000. (PSU Nos. 25, 26.) Defendants contend not only that

there is no evidence that they failed to wear face coverings every day between November 9, 2020 and June 21, 2021, but also that they never received proper notice of the November 9, 2020 NOV because it was improperly served. (DSU Nos. 18-23, 25-26.)

The County also contends that between August 23, 2020 and May 18,2021, Defendants did not submit an SDP through the County's online portal. (DSU No. 29.) Defendants dispute this, as they claim they attempted to submit an SDP but it was not complete, so the County rejected it. (DSU No. 29 ("Undisputed that Calvary did not submit a **completed** SDP, Calvary did attempted to submit a modified form."); Supplemental Declaration of Mariah R. Gondeiro In Support of Defendants' Opposition ("Supp. Gondeiro Decl.).)

On August 23, 2020, the County issued a NOV to Defendants for failing to submit an SDP, charging the minimum $250 fine. (DSU Nos. 30, 31.) Under the Urgency Ordinance, the $250 fine doubled every day that Defendants failed to submit an SDP until the fine reached $5,000, after which the fine accrued at $5,000 per day every day thereafter. (DSU No. 32.) Defendants' fines for failing to submit an SDP began accruing on August 23, 2020 and ran through May 18, 2021, when the Social Distancing Protocol was rescinded, and total $1,327,750. (DSU Nos. 33, 34.)

Defendants appealed the notices of violation and fines in the amount of $327,500 that were imposed between August 23, 2020 and October 18, 2020 to the Office of the County Hearing Officer; these included the August 23, 2020 NOV for the SDP violation and the associated $250 fine and fines that accrued

thereafter. (DSU Nos. 35, 36.) In the course of their appeal, Defendants conceded that they violated various public health orders. (DSU No. 37.) On November 2, 2020, the County Hearing Officer upheld the notices of violations cited between August 23, 2020 and October 18, 2020, including the SDP violation and fines. (DSU No. 38.)

Defendants challenged the County Hearing Officer's decision by filing a writ in the Superior Court. (DSU No. 39) In that proceeding, Defendants did challenge the constitutionality of the SDP requirements and the amount of fines imposed, but they aver that they did not have "a meaningful opportunity to litigate" their constitutional claims. (DSU No. 40.) And, while the Court upheld the County Hearing Officer's decision and rejected Defendants' First Amendment Challenge to the SDP requirement and their Eighth Amendment challenge to the fines imposed by the County up to that date, it cannot be disputed that the focus of the parties' briefing and argument during that proceeding was the County's ban on indoor gatherings. (DSU No. 41.) On May 7, 2021, Defendants filed a notice of appeal of the foregoing order, but voluntarily abandoned that appeal on June 24, 2021 because Defendants understood the Court's ruling to be non-appealable. (DSU Nos. 42, 43.)

To date, Defendants have failed to pay the outstanding administrative fines for the face covering and SDP violations, and owe late fee of 10 percent on those amounts. (PSU Nos. 44, 45.) Defendants therefore owe $3,917,925 in fines for the face covering and SDP violations. (Plaintiffs' RJN, Exhibit 191.)

However, Plaintiffs state that in an exercise of prosecutorial discretion, they seek a reduced amount of $2.8 million. Defendants again dispute that they owe these monies. (DSU Nos. 45-46.) And, while Defendants cannot dispute that they possess the funds to pay the fines and late fees, they contend that these fines are unconstitutionally excessive, they did not act with the requisite culpability to justify these fines and that requiring them to pay this amount will impair their ability to minister to the public. (DSU No. 53.)

B. Procedural

Plaintiffs initiated this action and sought injunctive relief in October 2020. On November 2, 2020, the Court issued a temporary restraining order, and on November 24, 2020 issued a modified temporary restraining order and preliminary injunction enjoining Calvary from violating restrictions on indoor gatherings and requirements for face coverings and social distancing and from operating without submitting a SDP to the County.

Calvary violated these court orders. As a result, Defendants sought then obtained a contempt order on December 17, 2020. After further non-compliance, the court issued a further contempt order on February 16, 2021 and ordered Calvary and McClure to pay monetary sanctions pursuant to Code of Civil Procedure sections 177.5 and Code of Civil Procedure section 1218, subdivision (a).

Calvary sought review of the contempt and sanctions orders in the instant action and two other actions involving the same parties. On August 15, 2022, the appellate court reversed the sanctions order

and annulled the contempt orders pursuant to the then recent United States Supreme Court decisions regarding the First Amendment's Protection of the free exercise of religion in the context of public health orders (see, e.g., *Tandon v. Newsom* (2021) 593 U.S._ [141 S. Ct. 1294]). The appellate court concluded that, under those decisions, the temporary restraining orders and preliminary injunctions were facially unconstitutional because they banned indoor worship. The appeal did not address the propriety of the County's orders requiring face masking and social distancing protocol or the fines assessed for Defendants' violations of those orders. The appellate court nevertheless found it was required to reverse the imposition of fines and sanctions in their entirety because the trial court's orders had not differentiated between indoor gatherings and other forms of wrongdoing.

Plaintiffs filed the operative FAC on July 29, 2021, asserting claims for (1) public nuisance per se; (2) public nuisance; (3) violation of County and State public health orders; (4) violation of County Urgency Ordinance No. NS-9.21; and (5) violation of Government Code § 25132. On August 26, 2022, Plaintiffs filed the instant motion seeking to summarily adjudicate the first, third, fourth and fifth causes of action in their favor. Defendants oppose the motion.

II. Defendants' Request for Additional Discovery

Defendants insist that summary adjudication is inappropriate at this time because further discovery is needed. Defendants made this same argument by ex

parte application filed on December 29, 2022, which application identified the need to (1) obtain correspondence regarding complaints concerning non-commercial activities and (2) conduct the deposition of the enforcement officer who signed off on the November 9, 2020 NOV. Although there was some confusion regarding resetting of this hearing, the Court ultimately considered and rejected Defendants' discovery argument. Moreover, since their ex parte application, it appears that Defendants have deposed the enforcement officer who served the November 9, 2020 NOV, and missed the deadline to compel the additional discovery they maintain they have yet to receive from the County. (See Plaintiffs' Reply at p. 10, fn. 20).

The Court has also reviewed the entirety of the evidence Defendants submitted to the Court with their opposition, including the portions of deposition transcripts of Dr. Sara Cody, Dr. Sarah Rudman, Michael Balliet, and Melissa Huerta and the Declarations of Mike McClure, William M. Shepherd, Carson Atherley, Barry Arata, Stephen E. Petty, P.E., C.I.H., C.SP., Ram Duriseti, M.D., PhD, Mariah Gondeiro, and Nada N. Higuera. The Court also reviewed and considered (over Plaintiffs' objections) Defendants' late filed Supplemental Response to Plaintiffs' Separate Statement of Undisputed Material Facts and Supplemental Declaration of Mariah R. Gondeiro In Support of Defendants' Opposition, including Exhibit A to that Supplemental Declaration. Although Defendants submitted these materials to the Court after the Court issued its tentative ruling and they are therefore improperly late, neither document changes the evidence already submitted in the case –

Defendants' Supplement Response to Undisputed Facts is based on the same evidence the Court already considered in its tentative ruling, and the Supplemental Declaration attaches an email confirming Defendants submitted a revised SDP through counsel on or around February 19, 2021 – a fact Plaintiffs do not dispute.

Defendants' own evidence demonstrates that Defendants did ask questions of Dr. Sara Cody, Dr. Sarah Rudman, Michael Balliet, and Melissa Huerta about the potential selective enforcement of the Urgency Ordinance. Defendants have also had over two years to pursue discovery both here and in the federal action, have consistently maintained that the County's health orders were unconstitutional since the appeal of the administrative proceeding, and obtained several opinions rom appellate courts and the U.S. Supreme Court outlining that court's clear views regarding the constitutionality of COVID-19 public health orders (or lack thereof). On this record, there is no good cause for a continuance for further discovery to be conducted; the matter is ripe for summary adjudication. *See Johnson v. Alameda County Med. Ctr.* (2012) 205 Cal.App.4th 521, 532; *Santos v. Crenshaw Mfg., Inc.* (2020) 55 Cal.App.5th 39, 47; *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246; *Mengers v. Department of Transp.* (2020) 59 Cal.App.5th 13, 25-26; *Yuzon v. Collins* (2004) 116 Cal. App.4th 166-168.

III. Request for Judicial Notice

A. Plaintiffs' Request

Plaintiffs request that the Court take judicial

notice of materials relating to the Covid-19 pandemic, including: government-issued (at federal, state and county level) proclamations and public health orders; ordinances issued by the County and other Bay Area counties; guidance issued by the California Department of Public Health; items from the administrative hearing before the Santa Clara County Office of the County Hearing Officer; social distancing protocol forms issued by the County; items from Calvary's appeal of fines issued by the County in the matter entitled *Calvary Chapel San Jose v. County Of Santa Clara,* Case No. 20CV374470; and transcripts from the contempt hearing before the Court. (See Declaration of Karun Tilak in Support of Motion for summary Adjudication ("Tilak Decl."), pp. 150-178.)

Each of the foregoing items are proper subjects of judicial notice pursuant to Evidence Code section 452, subdivisions (b), ©, (d) and (h), as "[r]egulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States," "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States," "[r]ecords of [] any court of this state or [] any court of record of the United States or of any state of the United States," and "facts and propositions that are not reasonably subject to dispute." Accordingly, Plaintiffs' request for judicial notice is GRANTED.

B. Defendants' Request

Defendants request the Court take judicial notice of Mandatory Directives for case reporting, capacity limitations and gatherings for different types of activities, businesses and industries issued by the

County (Exhibits 1-17, 22, 23); ordinances and other orders relating to Covid-19 adopted and//or issued by the County or other Bay Area counties (Exhibits 18-21); and Covid-19 guidance materials issued by the State of California or the California Department of Public Health (Exhibits 24-26, 28). The foregoing materials are proper subjects of judicial notice under Evidence Code section 452, subdivisions (b) and ©. Accordingly, Defendants' request for judicial notice is GRANTED.

IV. Plaintiffs' Motion for Summary Adjudication

A. Burden of Proof

The party moving for summary judgment/ adjudication bears the initial burden of production to make a prima facie case showing that there are not triable issues of material fact - one sufficient to support the position of the party in question that no more is called for. ((*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Plaintiffs moving for summary judgment bear the burden of persuasion that each element of the cause of action in question has been proved, and hence there is no defense thereto. (Code Civ. Proc.., § 437c.) Plaintiffs, who bear the burden of proof at trial by preponderance of evidence, therefore "must present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not- otherwise he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.." (*Aguilar, supra*, 25 Cal.4th at 851.) The defendant has no evidentiary burden until the plaintiff produces admissible and undisputed evidence on each element of a cause of action. (Weil & Brown, Cal. Prac. Guide:

Civ. Proc. Before Trial (The Rutter Group 2013), ¶ 10:238.) If the plaintiff meets this initial burden, the burden then shifts to the defendant to "show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).)

B. First and Third Causes of Action: Nuisance Per Se and Violation of County and State Public Health Orders

Plaintiffs' first and third causes of action are predicated on Defendants' alleged violations of the Risk Reduction Order, the Revised Risk Reduction Order, and the Safety Measures Order (collectively, the "Public Health Orders") by their failure to (1) wear face coverings or maintain adequate distances between personnel and attendees and (2) submit an SDP to the County.

"A nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular . . . activity, or circumstance, to be a nuisance." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163, internal citations and quotations omitted.) "Where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made." (*Id*, internal citations and quotations omitted.)

The County Board of Supervisors a legislative body, possesses the appropriate jurisdiction (see Cal. Const., art. XI, § 7), and its regulatory power "not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases" ((*Ex parte*

Shrader (1867) 33 Cal. 279, 284; see Gov. Code, §§ 25845 and 53069.4). The Board exercised this power by enacting the Urgency Ordinance, and in doing so expressly declared any violation of the Public Health Orders to be a nuisance. (Plaintiffs' RJN, Ex. 159, §§ 1(a), 3.)

While Defendants contend they did not hold church events so cannot have been observed violating the mask requirements every day, Defendants' violations of the Public Health Orders' face coverings and SDP requirements are otherwise undisputed. (PSU Nos. 18, 19, 29, 37.) It is also undisputed that the Public Health Orders required Defendants' personnel and members of the public entering Defendants' facilities to wear face coverings. Defendants expressly admitted under oath that they refused to require or enforce the wearing of face coverings during the time period they were required to do so; they publicly broadcasted large events where face coverings were not worn; and County enforcement officers confirmed through regular inspections that personnel and attendees were not required to wear face coverings. Defendants also admit they never submitted a completed SDP to the County through its online portal. (DSU No. 29.) Although, according to Defendants, they twice attempted to do so, but the County refused their submission.

Plaintiffs have plainly established that (1) Defendants violated the Public Health Orders, and (2) these violations are a nuisance because the Urgency Ordinance so states, and thus Plaintiffs have met their initial burden on the first and third causes of action.

C. Fourth and Fifth Causes of Action:

Violation of County Urgency Ordinance No. NC-9.21 and Violation of Government Code Section 25132

Per its express terms, violations of the Public Health Orders qualified as violations of the Urgency Ordinance, which authorizes the County "to file a civil action on behalf of the County . . . to recover all associated County costs, attorneys' fees, and any fines or penalties imposed" imposed thereunder. (Plaintiffs' RJN, Exhibit 159 at §§ 3 and 4.f.2.) Government Code Section 25132 similarly authorizes the County to prosecute such an action. (See Gov. Code, § 25132, subdivision (a) ["[t]he violation of a county ordinance may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action."].)

Defendants clearly violated the Public Health Orders' face covering and SDP requirements. (DSU Nos. 18, 19, 29, 37.) The August 23, 2020 NOV imposed a fine of $250 for Defendants' failure to submit a completed SDP as required, and these fines continued to accrue as Defendants did not submit a completed SDP through the County's online portal at any time between August 23, 2020 and May 18, 2021. (PSU Nos. 29, 37.) The August 23 SDP fine started at $250 (the minimum), doubled to $500 on August 24, $1000 on August 25, $2000 on August 26, and $4,000 on August 27, and then increased to $5,000 (the maximum) on August 28, 2020. (See Declaration of Jamila G. Benkato in Support of Plaintiffs' Motion for Summary Adjudication ("Benkato Decl."), ¶ 151, Exhibit 191, Columns B and C.) The fine then accrued at $5,000 every day that Defendants filed to submit

and SDP, totaling $1,327,750 on May 18, 2021. (DSU Nos. 31-34.)

The November 9, 2020 NOV imposed two $1,000 fines (the minimum) - one for failing to require personnel to wear face coverings and one for failing to require members of the public to do the same. (PSU Nos. 20, 21.) Because Defendants continued to violate the face coverings requirements, the fines continued to accrue as follows: doubled to $2,000 on November 10, doubled again to $4,000 on November 11, and then increased to $5,000 (the maximum) on November 12, 2020, after which they accrued at $5,000 for every day that Defendants continued to violate the orders. (Benkato Decl., Exhibit 191, Columns D-F.) By June 21, 2021, Defendants had accrued $2,234,000 in fines for failing to correct the two face covering violations. (PSU Nos. 25-26.)

Under the Urgency Ordinance, fines are due within 30 days of service of an NOV or 30 days after the conclusion of any administrative appeal. (Plaintiffs' RJN, Exhibit 159 at § 6(g).) Defendants filed an administrative appeal of the August 23, 2020 NOV, and the Hearing Officer issued its decision on November 2, 2020, meaning that the fine for the SDP violation was due 30 days later. (DSU Nos. 35-38) Defendants did not seek administrative appeal of the November 9, 2020 NOV; consequently, those fines were due within 30 days of that NOV. (PSU No. 27.) To date, Defendants have not paid any of the administrative fines. (DSU No. 44.) The Urgency Ordinance authorizes a late fee of 10 percent of any fines not timely paid, resulting in late fees totaling $356,175. (Plaintiffs' RJN, Exhibit 159 at § 6(I); PSU

No. 45.)

Given the foregoing, Plaintiffs have established that Defendants accrued administrative fines through their continued violations of the Public Health Orders and have failed to pay those amounts, resulting in the imposition of late fees. Thus they have met their initial burden on the fourth and fifth causes of action.

D. Defendants' Constitutional Defenses

1. Defendants' Constitutional Challenges are Not precluded By the Superior Court Order on County Hearing Officer's Decision

Relying on the doctrine of collateral estoppel, Plaintiffs insist summary adjudication of these claims is warranted, at least with respect to the SPD-related fines, for the additional reason that this Court's April 8, 2021 order on Defendants' appeal of the County Hearing Officer's decision sustaining the August 23, 2020 NOV and the fines in *Calvary Chapel v. County of Santa Clara*, Case No. 20CV374470 has a preclusive effect on Defendants' ability to litigate the existence of the SDP violations here.

The doctrine of collateral estoppel bars "relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90, quoting *People v. Carter* (2005) 36 Cal.4th 1215, 1240; see also

Lucido v. Super, Ct. (People) (1990) 51 Cal.3d 335, 341.)

Here, Plaintiffs appealed the County Hearing Officer's final administrative decision under Government Code section 53069.4, which permits a person contesting the final administrative order or decision of a local agency made pursuant to an ordinance regarding the imposition, enforcement, or collection of administrative fines or penalties to seek review by filing an appeal with the superior court as a limited civil proceeding. (Gov. Code, § 530069.4, subd. (b)(1).) Notably, the parties do not dispute that the hearing Officer is expressly precluded from considering constitutional challenges to the Public Health Orders as part of the administrative hearing. Defendants were not precluded, however, from making such arguments on their appeal of the County Hearing Officer's decision to the Superior Court. After the Court issued its order sustaining the County Hearing Officer's decision, Defendants filed a notice of their intention to appeal the decision, but then abandoned it. Because of this, Plaintiffs insist, Defendants cannot relitigate the same issues in this action.

The Court's decision affirming the County Hearing Officer's ruling discusses the Defendants' Free Exercise and unconstitutional conditions arguments, "reject[ing] Petitioner's claim that the requirement of an [SDP] burdens Petitioner's free exercise" and finding that Petitioner Calvary failed to show that submission of an SDP "would in any way infringe on its worship services." (Plaintiffs' RJN, Ex. 169 at pp. 5-9; Exhibit 170 at p. 7.) The Court also appears to have decided the constitutionality of the face coverings

and sustained the fines based on violations identical to those at issue in the November 9, 2020 NOV (they proceeded the violations reflected in the November 9 NOV) because it found that "no court has relieved Petitioner of its obligation comply with the requirement of face coverings and physical distancing." (Plaintiffs' RJN, Exhibit 170 at p.6.)

However, review of the parties' briefing and the portions of transcript of the hearing on Defendants' appeal reveals that collateral estoppel should not be applied here. While it is clear that Defendants' briefed and argued the unconstitutionality of the fines, their argument in that proceeding was based on the prohibition on indoor gathering, which had then recently been found unconstitutional by the U.S. Supreme Court in *Gateway City Church v. Newsom* (2021) 592 U.S. _ [141 S.Ct. 1460]. Defendants did not brief the constitutionality of face coverings. And, while the opinion does seem to consider (and plainly rejects) a constitutionality argument regarding Defendants' failure to submit an SDP, the Defendants' argument regarding the unconstitutionality of the SDP also focused on its requirement that they agree not to hold indoor gatherings. Thus, on this record, the Court declines to apply collateral estoppel as a basis to grant summary adjudication for Plaintiffs.

Collateral estoppel is but one component of the doctrine of res judicata, which prohibits the relitigating of a cause of action litigated in a prior proceeding as a claim or defense in a subsequent proceeding involving the same parties or parties in privity with them. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Res judicata bars "not

only the reopening of the original controversy, but also subsequent litigation of all issues which were or could have been raised in the original suit." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821.) Because the Court finds that the constitutionality of requiring face coverings and the SDP (separated from the indoor gathering requirement) were not fully addressed by Defendants during their appeal of the County Hearing Officer's ruling, the Court also finds res judicata not to be applicable to the present proceedings.[1]

2. The Public Health Orders Do Not Violate the First Amendment or Due Process Clause[2]

"The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see *Cantwell v. Connecticut* (1940) 310 U.S. 298, 303, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" (*Employment Div. v. Smith* (1989) 494 U.S. 872, 876-77, quoting U.S. Const., Amdt. 1.) "The free exercise of religion means,

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[1] Defendants also argue that the first and third causes of action are moot because the orders on which they are predicated have been rescinded. This argument is without merit because Plaintiffs are not seeking declaratory relief, and the finding that Defendants violated the Public Health Orders is necessary to the Court's determination of the fines under the first and third claims, which is still a live issue.

[2] Defendants concede that their Free Exercise and Equal Protection arguments rise and fall together. (Opp. at p. 14, fn.1.)

first and foremost, the right to believe and profess whatever religious doctrine one desires." *(Id.*) "But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts . . . ." (*Id.;* see also *Kennedy v. Bremerton Sch. Dist.* (2022) 142 S. Ct. 2407, 2422 ("The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." (internal citation and quotations omitted).)

However, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.'" (*Smith* 494 U.S. at 886, quoting (1940) *Minersville School Dist. Bd. of Ed. v. Gobitis* 310 U.S. 586, 594-595).

Accordingly, in *Reynolds v. United States* (1879) 98 U.S. 145, the court held that a criminal conviction for violating a statute prohibiting polygamy did not violate the Free Exercise Clause even though polygamy was a part of the defendant's sincerely held religious convictions. In so finding the court observed: "Can a man excuse his practices to the contrary [of the prohibition] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in

effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id* at 166-167.

Similarly, in *Prince v. Massachusetts* (1944) 321 U.S. 158, the court found a statute prohibiting minors from selling or offering for sale "any newspapers, magazines, periodicals, or other articles of merchandise" on the streets did not violate the Free Exercise Clause when it was applied to a parent and child distributing Jehovah's Witness's literature, noting "neither rights of religion nor rights of parenthood are beyond limitation" (*Id*. at 166; see also *Smith,* 494 U.S. at 878-879 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.")

Accordingly, United States Supreme Court cases "establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *(Church of Lukumi Babalu Aye v. City of Hialeah* (1992) 508 U.S. 520, 531.) Thus, the court held, for example, that an Oregon state law prohibiting sacramental peyote use and denial of unemployment benefits did not violate the Free Exercise Clause. *(Smith*, 494 U.S. 872.)

However, a "law [that] discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons", must withstand "the most rigorous of scrutiny." *(Church of Lukumi Babalu Aye*, 508 U.S. at 532; *Fulton v. City of Philadelphia* (2020) 592 U.S. __, [141 S. Ct. 1868,

1881].) Under this principle, the court "invalidated a state law that disqualified members of the clergy from holding certain public offices, because it 'impose[d] special disabilities on the basis of . . . religious status.'" (*Church of Lukumi Babalu Aye,* 508 U.S. at 532, quoting *McDaniel v. Paty* (1978) 435 U.S. 618.) Similarly, in *Fowler v. Rhode Island,* the court found an ordinance interpreted to prohibit Jehovah's Witness preaching in a public park but to permit preaching in a Catholic mass or Protestant church service was applied in an unconstitutional manner. *(Fowler v. Rhode Island* (1953) 345 U.S. 67; see also *Church of Lukumi Babalu Aye*, 508 U.S. 520 (law prohibiting animal sacrifice unconstitutional because targeted the Santeria religion).)

To determine neutrality of a particular law or government policy, the court is to begin by examining the text. *(Church of Lukumi Babalu Aye,* 508 U.S. at 533.) "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." (*Id.)* However, "[f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality.'" (*Id.,* quoting *Gillette v. United States* (1971) 401 U.S. 437, 452.) "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable [and thus not neutral], regardless of whether any exceptions have [actually] been given, because it "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude.'" (*Fulton*, 141 S. Ct. at 1871, quoting *Smith*, 494 U.S. at 884.) Such "[a] government policy can

survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interest." (*Fulton*, 141 S. Ct. at 1881.)

Here, the face covering requirement imposed by the Public Health Orders applied to "all individuals, businesses, and other entities in the County" (See Plaintiffs' RJN, Exhibit 153 at § 2, Exhibit 154 at § 2 and Exhibit 156 at § 2) and thus were facially neutral, generally applicable requirements for all comparable, regulated entities in the County.

Defendants insist that the face covering requirements were nevertheless unconstitutional because various businesses, such as restaurants, personal care services, athletic activities, and youth programs, were "exempt" from both the mask and the social distancing requirements. (Opp. at pp. 11-12.) Defendants rely, in part, on the Declarations of William M. Shepherd and Barry Arata to support this contention. Mr. Shepherd explains that workers in his construction business, which he has owned since 2015, "removed their masks if it was impossible or unsafe to wear a mask to perform their job, as allowed by Santa Clara County's guidance for construction workers." (Shepherd Decl., ¶ 4.) Mr. Arata, a fire engineer in San Jose, explains that "even though the San Jose Fire Department required us to wear masks, most firefighters did not wear masks indoors." (Arata Decl., ¶ 3.) Mr. Arata also states that he never wore a mask during his 90-minute "intense cardio" work outs he engaged in with other firefighters. (Arata Decl., ¶ 2.) Mr. Shepards's examples appear to have been outside, and neither witness says anyone made a complaint with the County or that the County even knew about

this absence of mask wearing. These statements therefore do not provide any evidence that *the County* was applying the Public Health Ordinances differently in these contexts than to Defendants; they merely demonstrate how these individuals were and were not following the Public Health Ordinances in their daily routines.

Defendants also argue the Public Health Orders were unconstitutional because "the County exempted government entities and their contractors *at their own discretion* from social distancing, wearing masks, or any other restriction to the extent that such requirements would impede or interfere with an essential government function. . ." (Opposition, p.12 (emphasis in original; internal citations omitted).) Again, this is different than *Fulton* for example, where *the government* was permitted to grant exceptions to some foster care providers, and the Supreme Court held the government therefore had to withstand strict scrutiny. Here, the County, operating on an emergency basis to take steps to prevent the spread of COVID-19, granted discretion to individuals to determine on a case by case basis whether their job might require them to remove their mask or get close to another person. The government was not engaging in an analysis to determine when an exception was warranted, and the default assumption was the face coverings were required to be worn.

Moreover, Defendants do not contend they sought or engaged in incidental or periodic exceptions to the mask requirements as the Public Health Orders allowed in certain circumstances, but rather, as evidenced from their conduct, Defendants unilaterally

gave themselves a blanket exception for all of their activities at any time in any location, regardless of the number of attendees. Nor do Defendants submit any *evidence* to establish that any of the foregoing activities are comparable to Defendants' gatherings with respect to the risk of Covid-19 transmission. Defendants concede that they routinely held events where 300-600 people were in attendance – people who were not necessarily in regular contact with one another as was the case with the small number of Mr. Shephard's workers or the firefighters Mr. Arata worked with.

In addition, many of the businesses Defendants accuse of being "exempt" were subject to unique restrictions that were not applicable to gatherings like those that took place at the church, and the County's directive for gatherings specifically stated that food or drink could be served and face coverings could be removed for purposes of religious ceremony. (Defendants' RJN, Exhibits 4, 12, 13 and 22.) The Court previously noted Defendants' mischaracterization of many of the face covering and distancing requirements in its order on their demurrer to the FAC and explained that it was "not accurate to portray restaurant patrons as being permitted to maintain social experiences completely unfettered and without *any* restriction as compared to church congregants." Defendants simply fail to demonstrate that the Public Health Orders treated *comparable* secular activities more favorably with respect to face coverings and SDP requirements.

Defendants' cited authorities are also distinguishable. There, comparisons were made (1) in

the context of analyzing bans and capacity restrictions, which are not at issue here (see, *Tandon*, 141 S. Ct. at 1296), (2) at the preliminary injunction stage subject to a lower evidentiary standard (see *Roman Catholic Diocese*, 141 S. Ct. at 65-66), and (3) on completely different records (see *Calvary Chapel Daytona Valley* (9th Cir. 2020) 982 F.3d 1228, 1230-1231). It is also critical to note that in *Roman Catholic Diocese*, which Defendants rely heavily on in their Opposition,[3] the religious institutions that challenged the capacity limitations "rigorously implemented and adhered to all health protocols", and the capacity limitations were facially different for religious institutions than for nearly all other businesses. 141 S. Ct. at 67. In none of these prior cases was a religious institution challenging wearing face coverings. And, in none of these prior cases was a religious institution asking not to comply with Public Health Orders that were applicable to all other business, like the Defendants here and the parties in *Reynolds, Prince* and *Smith*.

However, even if the Court were to apply strict

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[3] Defendants emphasize the Ninth Circuit's observation that "The Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S. Ct. 63 (per curiam) arguably represented a seismic shift in Free Exercise law, and compels the result in this case." *Calvary Chapel Dayton Valley v. Sisolak* (2020) 982 F.3d 1228, 1231. The Ninth Circuit does not explain what "seismic shift" it observed in that opinion – perhaps it referred to the application of strict scrutiny in the context of an emergency health order given its further observations in footnote 3. However, the fact remains that, like *Roman Catholic Diocese*, the Ninth Circuit was addressing strict and unevenly applied capacity restrictions, not a more narrowly tailored, generally applicable masking requirement.

scrutiny to the County's orders regarding face coverings and SDP, the face covering and SDP requirements did not run afoul of the Free Exercise Clause. It is undisputed that the government interest in reducing the spread of Covid-19 is compelling, and requiring face coverings and an SDP were reasonable, unobtrusive means of addressing that indisputable compelling government interest.[4] In fact, the United States Supreme Court recognized face coverings (and social distancing requirements) as a basic public health measure consistent with being able to conduct indoor religious worship and a "narrower option[]" than an outright ban on such gatherings. (*South Bay United Pentecostal Church v. Newsom* (2021) 592 U.S. __, 141 S. Ct. 716, 718-719; see also, e.g., *Gateway City Church v. Newsom* (2021) 592 U.S. __, 141 S. Ct. 1460, and *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 592 U.S. __, 141 S. Ct. 63.)

In *South Bay United Pentecostal Church v. Newsom,* which enjoined the County from enforcing a prohibition on indoor worship by order dated February 5, 2021, Justice Gorsuch's concurrence, which Justices Thomas and Alito joined, states:

> [California] insists that religious worship is so different that it demands especially onerous regulation. The state offers essentially four reasons why: (1) It says that religious exercises involve (1) large numbers of people mixing from

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[4] Because the Court finds the SDP and masking requirements constitutional even if strict scrutiny applies, Defendants' arguments regarding the California Constitution are unavailing. (See Opposition, p. 11.)

> different households; (2) in close physical proximity; (3) for extended periods; (4) with singing.
>
> No one before us disputes that factors like these may increase the risk of transmitting COVID-19. And no one need doubt that the State has a compelling interest in reducing that risk.

Justice Gorsuch goes on to chastise California for not considering less intrusive means–like masks and social distancing–than outright banning indoor worship:

> Nor, again, does California explain why the narrower options it thinks adequate in many secular settings – such as ***social distancing requirements, masks,*** cleaning, plexiglass barriers, and the like – cannot suffice here. Especially when those measures are in routine use in religious services across the country today. (Emphasis added.)

Justice Gorsuch again raises the use of masks as a less restrictive means when fleshing out his "quibble" with the option regarding singing: "Once more, too, the State has not explained how a total ban on religious singing is narrowly tailored to its legitimate public health concerns. Even if a full congregation singing hymns is too risky, California does not explain why even a single ***masked*** cantor cannot lead worship behind a ***mask*** and a plexiglass shield." (emphasis added.)

At argument, Defendant urged the Court not to be persuaded b these comments from the Justices, insisting that the fact that the United States Supreme Court mentioned masks and social distancing in its

prior opinions does not mean those restrictions are constitutional under the First Amendment. While it is true that the Supreme Court was there focused on the ban on indoor gatherings, the court's references to masks and social distancing as less intrusive means plainly provide guidance for potential forms of protections that might pass constitutional muster, and Defendants do not dispute that they continued to refuse to enforce masking or social distancing requirements during church activities. From Defendants' perspective *any* protections the County sought to put into place to decrease the spread of COVID-19 between May 2020 and June 2021 that were applied to Calvary's religious services and activities would be unconstitutional. That is simply not the law. As the Supreme Court explained in related context almost 80 years ago: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts* (1944) 321 U.S. 158, 166-67.

Because Plaintiffs have demonstrated that Defendants violated the Public Health Orders and thus committed a public nuisance, and Defendants have failed to demonstrate that those orders were unconstitutional, the Court finds that Plaintiffs are entitled to summary adjudication of their first and third causes of action.

3. The Fines Do Not Violate Due Process

Defendants assert that they received the November 9, 2020 NOV for the first time during discovery in this action and their rights were violated because it was never served on a proper party, i.e., one

who was authorized to receive service on behalf of the church. The Court does not find this argument persuasive.

Plaintiffs proffer evidence demonstrating Defendants' counsel was served with the NOV only 8 days after its issuance, on November 17, and again on November 30, 2020. (See Supplemental Declaration of Jamila G. Benkato in Support of Reply ("Benkato Supp. Dec."), ¶¶ 7-13,23.) The Due Process Clause only requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 306, 314.) The Urgency Ordinance, which is the relevant authority on this point and *not* state rules for service of summons or other court filings that Defendants cite in their opposition, authorized the County to serve NOVs by a variety of methods, including: personal service on a Responsible Party, posting the NOV conspicuously at the property entrance, or any other method "reasonably calculated to effectuate notice." (Plaintiffs' RJN, Exhibit 159, § 7(b).) A "Responsible Party" is defined to include an "agent" of the violating entity. (*Id*., § 2(I).)

Here, the evidence submitted by the County establishes that it met these requirements. The November 9 NOV was conspicuously posted on the building and was also personally served on an agent of the church who had apparent authority to accept service by engaging in the following conduct: leading a prayer event at the church; letting people into the closed church building; allowing enforcement officers

into church spaces; demanding legal authority for and granting permission to post notices; and verbally affirming that he had authority to accept service. (Benkato Supp. Decl., Exhibit 7, ¶ 23; Exhibit 10, ¶ 22; Exhibit 12 at _035052, 058; and Exhibit 13 at pp. 119-:23-121:9.) Given the foregoing, the County has established that it reasonably served an agent of Defendants with the November 9 NOV.

Defendants further insist that their due process rights were violated because the County engaged in arbitrary and discriminatory enforcement of the Public Health Orders under the Urgency Ordinance, but they fail to establish as much with admissible evidence. (See Opp. at p. 18:1-11.) None of the NOVs Defendants cite demonstrate a deliberate singling out of the recipient entity, especially where one was for another church and others were issued months later under *different* protocols and the offending parties came into compliance after admitting wrongdoing. (See Benkato Supp. Decl., Exhibit 13 at pp. 128:25-130:2, 132:14-19, 139:6-16 and exs. 43, 57, 58; Exhibits 17 and 18.) Further, with regard to non-commercial activities, as Defendants own evidence demonstrates, the County received complaints about *both* secular and religious gatherings at private homes, and thus any difference in private versus business enforcement strategies does not, by itself, show discriminatory enforcement against religious activities. (See Declaration of Moriah Gondeiro in Support of Defendants' Opposition to Motion for Summary Adjudication, ¶ 24, Exhibit 41.)

During argument, Defendants attempted to further clarify that the *amount* they were fined as

compared to other entities demonstrates an unconstitutionally arbitrary enforcement, pointing out that other entities were fined for only a few days, at most. This argument ignores that the other entities promptly came into compliance with the rules and Defendants, through their own choices and actions, did not.

4. The Fines Do Not Violate the Eighth Amendment

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." (*United States v. Bajakjian* (1998) 524 U.S. 321, 334.) The Supreme Court sets out four considerations to determine proportionality: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R. J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728, citing *Bajakjian* (19524 U.S. 321, 326). Under this analysis, the fines imposed for Defendants' repeated violations of the Public Health Orders are not unconstitutionally excessive.

First Defendants' culpability is plain. Defendants were on notice of their violations of the County's Public Health Orders for many months, they encouraged others to violate those orders (PSU Nos. 18-19, 29, 37, 46; Benkato Decl., Exhibit 179 at pp. 141:5-142:5.), and they refused to come into compliance even in the face of knowing that church attendees had contracted Covid-19 and displayed symptoms of the virus (PSU Nos. 47, 48), and that the Academy had to be closed because of a major outbreak among students and teachers (PSU Nos. 49-51).

The relationship between the penalty and the harm is also plain. In all of Defendants' briefing and argument, they simply ignore that when their meetings, services and other activities ended, scores or sometimes hundreds of attendees would leave the church, fan out throughout the County and put at risk the physically vulnerable for whom contracting Covid-19 could mean death. It should appear clear to all– regardless of religious affiliation– that wearing a mask while worshiping one's god and communing with other congregants is a simple, unobtrusive, giving way to protect others while still exercising your right to religious freedom. Unfortunately, Defendants repeatedly refused to model, much less, enforce this gesture. Instead, they repeatedly flouted their refusal to comply with the Public Health Orders and urged others to do so "who cares what the cost", including death.[5]

The cumulative fine amount Defendants now argue is excessive is solely the result of Defendants' own egregious conduct and election to continue violating Public Health Orders despite repeated efforts by the County to compel them to comply. Defendants cannot complain about the "cumulative size of the penalty" "when they had control over [the relevant time period] yet allowed the penalties to accumulate." (*City and County of San Francisco v. Sainez* (2000) 77

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[5] Defendants argue the County cannot point to a single case of Covid-19 that came from defendants' activities. Defendants ignore, however, that they refused to report any cases, and the easy spread and difficulty of contract tracing was part of the reasoning for the generally applicable face covering and social distancing requirements to begin with.

Cal.App.4th 1302, 1315-1316.)

Third, the fines imposed by the Urgency Ordinance are in line with similar ordinances enacted by other counties and with fines imposed by other County and states laws. (See RJN, Exhibit 177 at § 7.99.05(D), (F) [Marin County-fines up to $10,000 for Covid-19 violations by commercial entities, including fines that double daily up to that amount]; Exhibit 178 at § VI(E) [Sonoma County - fines of $1,000 for a first violation, $5,000 for a second violation, and $10,000 for each additional violation for commercial entities]; Exhibit 176 at § 8.85.050(D)(2) [Napa County- fines of $5,000 for commercial activities]; Exhibit 175 at § 6 [San Mateo County- fines of up to $3,000 for each violation].) The Urgency Ordinance also comports with other Santa Clara County Ordinance Code provisions that impose similar fine amounts for a variety of violations. (See, e.g., Santa Clara County Ordinance Code §§ A1-37, A1-42(b)(2) [authorizing daily fines up to $5,000 for second and subsequent violations of, among other things, any code provision declaring a violation to be a public nuisance].)

Finally, Defendants are indisputably able to pay the amounts owed; their revenues increased during the pandemic, and the Church received donations specifically for the purpose of paying the fines. (PSU No. 53.)

In their opposition, Defendants do not dispute their ability to pay the fines but instead endeavor to downplay their culpability by asserting they acted in good faith adherence with their sincerely held religious beliefs. (Opp. at p. 17:15.) But Defendants' religious beliefs did not give them carte blanche to regularly

violate face covering and SDP requirements that were neutral and generally applicable to all comparable, regulated entities in the County, and otherwise enabled them to continue to conduct indoor religious worship as they desired. As the Supreme Court noted, such public health measures were "routine [] in religious services across the country" during the initial stages of the pandemic, and deemed permissible. (*South Bay United Pentecostal Church, supra,* 141 S. Ct. at 718-719 (Gorsuch, J., conc.).)

Although the Court finds that the fines do not violate the Eight Amendment, after careful study of the spreadsheet attached to the Benkato Declaration as Exhibit 191, the Court does find that certain of the fines should not be imposed for other reasons. First, certain of the fines related to the August 23, 2020 NOV have already been found to be unconstitutional, and the Court of Appeal therefore reversed imposition of those fines. The Court therefore finds it would be improper to impose those fines now.

Next, the Court agrees with Defendants that imposing fines for both failing to submit and SDP and to enforce mask wearing requirements is akin to fining Defendants for the same violation twice. The Court reaches this conclusion because according to Plaintiffs, the SDP required Defendants "to certify that [they] were taking protective measures including (1) training personnel about COVID-19, (2) instituting a process for reporting positive COVID-19 cases to the County, and (3) *agreeing to follow any applicable Public Health Orders, guidance or directives."* (Plaintiff's Opening Brief, p. 8 (emphasis added), citing PRJN, Ex. 164, Cody Decl. ¶ 32.) Defendants concede they did not

agree to and did not enforce the masking requirements imposed by the County. That refusal is already subsumed in the fine for refusing to submit and comply with a complete SDP, which required masking. Defendants further argue that if any aspect of the SDP is found unconstitutional, then the entire fine for the SDP must be found unconstitutional, and that the masking fine should not be imposed daily because there is a insufficient evidence in the record that Defendants failed to enforce masking requirements every single day, since inspections were not conducted every single day.

While the Court agrees that the refusal to enforce masking requirements can be considered covered by the refusal to submit an SDP[6] and the Court will therefore not impose separate fines for those violations, the Court disagrees with Defendants that the record is insufficient to demonstrate Defendants refused to comply with masking from November 9, 2020 through June 21, 2021. Defendants repeatedly announced their refusal to comply with masking requirements, never reported to the County that they had come into compliance with the masking requirement, and to this day maintain that they were never required to comply with that requirement at any time under any circumstances.

Looking only at the face covering fines from

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[6] The Court need not address Defendants' other arguments regarding the SDP both because the Court is not imposing the fine for failure to submit an SDP and because Defendants have not individually challenged the various aspects of the SDP requirements.

November 9, 2020 through June 21, 2021 (columns D and E in Exhibit 191 to the Benkato Declaration), and adding the 10% interest, the Court therefore finds the appropriate fine total to be $1,228,700.

Plaintiffs' motion for summary adjudication is accordingly **GRANTED**.[7]

IT IS SO ORDERED.

Date: April 7, 2023 /s/ Evette D. Pennypacker
The Honorable Evette D. Pennypacker
Judge of the Superior Court

[7] Defendants' Renewed Motion for Stay is denied. Most of federal court action was dismissed and the rest stayed by an order in the federal action dated March 10, 2023, rendering Defendants' motion moot.

APPENDIX C

People v. Calvary Chapel San Jose

Court of Appeal of California,

Sixth Appellate District

August 15, 2022, Opinion Filed

H048708, H048734, H048947

Reporter

82 Cal. App. 5th 235 *; 298 Cal. Rptr. 3d 262 **; 2022 Cal. App. LEXIS 697 ***; 2022 LX 30760; 2022 WL 3355808

Notice: As modified Sept. 7, 2022. NOT CITABLE—ORDERED NOT PUBLISHED

[265] GREENWOOD, P. J.—**

I. INTRODUCTION

[*2]** In 2020 the State of California and the County of Santa Clara (collectively, the People) issued a series of public health orders intended to combat the COVID-19 pandemic. Relevant here, the public health orders included orders restricting indoor gatherings and requiring face coverings, social distancing, and submission of a social distancing protocol by businesses, including churches. Calvary Chapel San Jose (Calvary Chapel) and its pastors, Mike McClure and Carson Atherley (collectively, Calvary Chapel), failed to comply with any of these public health orders.

Due to Calvary Chapel's ongoing failure to comply with the public health orders, the People filed a complaint for injunctive relief. The trial court issued a November

2, 2020 temporary restraining order, followed by a November 24, 2020 modified temporary restraining order and preliminary injunction that enjoined Calvary Chapel from holding indoor gatherings that did not comply with the public health **[***3]** orders' restrictions on indoor gatherings and requirements that participants wear face coverings and socially distance. Calvary Chapel was also enjoined from operating without submitting a social distancing protocol to the County.

It is undisputed that Calvary Chapel violated the November 2, 2020 temporary restraining order, the November 24, 2020 modified temporary restraining order, and the preliminary injunction by failing to comply with any of the public health orders. The People then sought an order of contempt, which the trial court issued on December 17, 2020, based on Calvary Chapel's violation of the November 2, 2020 temporary restraining order and preliminary injunction. The trial court also issued a February 16, 2021 order of contempt, based on Calvary Chapel's violation of the November 24, 2020 modified temporary restraining order. The trial court additionally ordered Calvary Chapel, McClure, and Atherley to pay monetary sanctions pursuant to Code of Civil Procedure section 177.5[1] for violation of the court's orders, and pursuant to section 1218, subdivision (a) for contempt of court.

Calvary Chapel now seeks review of the trial court's contempt orders and orders to pay monetary sanctions

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[1] All subsequent undesignated statutory references are to the Code of Civil Procedure.

in the three cases **[**266]** before us, including H048708, **[***4]** *People v. Calvary Chapel San Jose*; H048734, *Calvary Chapel San* **[*241]** *Jose v. Superior Court*; and H048947, *McClure v. Superior Court*.[2] For the reasons stated below, we conclude that the temporary restraining orders and preliminary injunctions are facially unconstitutional pursuant to the recent guidance of the United States Supreme Court regarding the First Amendment's protection of the free exercise of religion in the context of public health orders that impact religious practice (see, e.g., *Tandon v. Newsom* (2021) 593 U.S. ___ (*Tandon*).) As the underlying orders which Calvary Chapel violated are void and unenforceable, we will annul the orders of contempt in their entirety and reverse the orders to pay monetary sanctions. (See *In re Berry* (1968) 68 Cal.2d 137, 140, 157 [65 Cal. Rptr. 273, 436 P.2d 273] (*Berry*).)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Preliminary Injunction*

1. *The Complaint*

In October 2020 plaintiffs the People of the State of California, the County of Santa Clara (County), and Sara H. Cody, M.D. (Dr. Cody), in her official capacity as health officer for the County of Santa Clara, filed a complaint for injunctive relief against defendants Calvary Chapel and its senior pastor, Mike McClure (collectively Calvary Chapel).

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[2] On the court's own motion, we ordered cases Nos. H048708, H048734, and H048947 to be considered together for purposes of oral argument and disposition.

Plaintiffs alleged that Calvary Chapel had failed to comply with certain state and county public health orders that had been issued to protect the public during the **[***5]** COVID-19 pandemic at a time when no cure or vaccine was available. Plaintiffs asserted that "[t]he best way to protect the public from COVID-19 is to undertake risk-mitigation measures to prevent transmission and infection, such as avoiding indoor gatherings, wearing face coverings, keeping sufficient physical distance, and avoiding singing or shouting near others while indoors." Plaintiffs further asserted that the evidence had shown that indoor gatherings posed a greater risk of COVID-19 transmission, since the virus spread from person to person through respiratory droplets, and that "[c]hurch gatherings are a common source of 'superspreader' events."

The specific public health orders that Calvary Chapel had violated included, according to plaintiffs, the following orders: (1) the County's July 2, 2020 risk reduction order requiring all businesses to submit a social distancing protocol, requiring all persons to maintain a minimum distance of six feet from persons outside their household, requiring all persons within a business **[*242]** (including a church) to wear face coverings unless medically exempt, and imposing limitations on gatherings as subsequently directed by Dr. Cody; (2) Dr. Cody's **[***6]** gatherings directives, as revised from July 8, 2020, through September 8, 2020, that prohibited indoor gatherings that brought "together multiple people from separate households in a single space," such as religious services, and required face coverings for outdoor gatherings unless medically exempt; (3) the State's August 28, 2020 order implementing the "Blueprint for a Safer Economy," a

tiered system for modifying public health measures based on COVID-19 test and case rates, which placed the County in the most restrictive tier 1 (prohibiting indoor gatherings) prior to September 8, 2020, and then in the less restrictive tier II (imposing capacity limitations on gatherings of 25 percent capacity or 100 persons, whichever was fewer); (4) the County's **[**267]** October 5, 2020 revised risk reduction order, which applied to all activities and sectors and required submission of a social distancing protocol, wearing face coverings at all times (including inside churches), and maintaining six feet of social distance from persons outside one's household; and (5) Dr. Cody's October 13, 2020 revised gatherings directive, which allowed indoor gatherings with a capacity limitation of 25 percent or 100 persons, whichever **[***7]** was fewer, and continued to prohibit indoor singing.

To authorize enforcement of these and other pandemic-related public health orders, on August 11, 2020, the County's board of supervisors adopted Urgency Ordinance No. NS-9.921, which created "a comprehensive civil enforcement program to combat the spread of COVID-19." The urgency ordinance included a schedule of fines for violation of the public health orders, as confirmed or observed by the County's code enforcement officers during their investigation of public complaints.

After receiving a complaint about Calvary Chapel, the County issued an August 21, 2020 cease-and-desist letter that demanded that Calvary Chapel comply with the public health orders and cease to hold indoor gatherings. Calvary Chapel allegedly failed to comply with the cease-and-desist letter. After the County's

code enforcement officers' investigations revealed that Calvary Chapel had continued to violate the public health orders, they issued a series of notices of violation of health officer orders from August 23, 2020, to October 25, 2020. According to plaintiffs, Calvary Chapel has accrued more than $350,000 in fines that were imposed by the County due to Calvary **[***8]** Chapel's unlawful public gatherings and violations of the requirements for social distancing, face coverings, and submission of a social distancing protocol.[3]

[*243]

Based on these and other allegations, including defendant McClure's statement in the local newspaper, the San Jose Mercury News, that Calvary Chapel would not comply with the public health orders, plaintiffs sought a temporary restraining order, a preliminary injunction, and a permanent injunction to enjoin Calvary Chapel "from conducting any gathering or service that does not fully comply with relevant State and County public health orders, including the Risk Reduction Order, the Gatherings Directive, the State August 28 Order, the Revised Risk Reduction Order, and the Revised Gatherings Directive."

2. *November 2, 2020 Temporary Restraining Order*

After filing their complaint, plaintiffs applied for a temporary restraining order and an order to show cause why a preliminary injunction should not issue.

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[3] The record reflects that the County issued a notice of imposition of fines in the amount of $357,750 to Calvary Chapel on October 26, 2020, for violation of the public health orders. These fines are not at issue in the present appeal.

The trial court granted the application in the November 2, 2020 order.

The temporary restraining order included in the November 2, 2020 order enjoined Calvary Chapel from "1. Conducting any gathering that does not fully comply with both **[***9]** the State and County public health orders, including but not limited to: holding gatherings indoors in excess of 100 people or 25% of capacity, whichever is less; holding outdoor gatherings in excess of 200 people; allowing participants to attend gatherings without wearing face coverings; allowing participants to attend gatherings without maintaining adequate social distance; and allowing singing at indoor gatherings; [¶] 2. Operating, whether **[**268]** indoors or outdoors, without the prior submission and implementation of a Social Distancing Protocol." The November 2, 2020 order also included an order to show cause why a preliminary injunction should not issue enjoining Calvary Chapel as set forth in the temporary restraining order.

Additionally, the November 2, 2020 order directed the County to post the temporary restraining order on the Calvary Chapel property and authorized County personnel to enter the Calvary Chapel property to monitor compliance with the order.

3. *November 24, 2020 Modified Temporary Restraining Order*

Plaintiffs subsequently applied for modification of the November 2, 2020 temporary restraining order on the grounds that the County had been moved to the more restrictive **[***10]** tier I of the state's Blueprint for a Safer Economy, which prohibited indoor gatherings,

including worship services, due to increasing COVID-19 case counts. The trial court granted the application in the November 24, 2020 order.

The November 24, 2020 modified temporary restraining order enjoined Calvary Chapel from the following: "1. Conducting any gathering that does **[*244]** not fully comply with both the State and County public health orders, including but not limited to, complying with prohibitions on: holding gatherings indoors; holding outdoor gatherings in excess of 200 people; allowing participants to attend gatherings without wearing face coverings; allowing participants to attend gatherings without maintaining adequate social distance of no less than six feet; allowing singing or chanting at indoor gatherings; and [¶] 2. Operating, whether indoors or outdoors, without the prior submission and implementation of a Social Distancing Protocol."

Additionally, the November 24, 2020 modified temporary restraining order directed the County to post the order on Calvary Chapel property, ordered Calvary Chapel not to remove the order once it was posted on Calvary Chapel property, and authorized the **[***11]** County personnel to enter Calvary Chapel property to monitor compliance with the order.

4. *Preliminary Injunction*

After investigation by the County's code enforcement officers showed that Calvary Chapel was continuing to violate the public health orders by holding large indoor worship services every Sunday without enforcing either the capacity limitations, the social distancing and face covering requirements, or the prohibition on

singing, plaintiffs moved for a preliminary injunction. Plaintiffs sought to enjoin Calvary Chapel from "(1) holding or hosting indoor gatherings at their facilities that exceed 100 persons or 25% capacity, whichever is smaller, (2) allowing non-exempt persons to attend their indoor gatherings without face coverings, (3) allowing persons to attend their indoor gatherings without social distancing, (4) permitting singing indoors, and (5) failing to submit a Social Distancing Protocol."

The trial court granted the motion for a preliminary injunction in the December 4, 2020 order. In so ruling, the trial court rejected Calvary Chapel's argument that the public health orders violated the free exercise clause of the First Amendment. The court determined that "the restrictions on 'indoor gatherings' are not **[***12]** specifically targeted at non-secular gatherings as they are generally applicable to both secular and non-secular indoor gatherings such as movie theatres, political gatherings, cultural events, community meetings, cardrooms, gyms, weddings, funerals, etc. These are gatherings where individuals **[**269]** have sustained indoor contact with other attendees as opposed to grocery or retail stores where contact is far more limited in duration. As these public health orders apply to both secular and non-secular gatherings, the Court finds that they are subject to a rational basis review and concludes that they are rationally related to a legitimate governmental interest—protecting public health and safety." The court also distinguished the recent United States Supreme Court decision in *Roman Catholic Diocese* **[*245]** *of Brooklyn v. Cuomo* (2020) 592 U.S. ___ (*Roman Catholic Diocese*), since the occupancy

limits the Supreme Court found unconstitutional in that case appeared to target places of worship, and the plaintiff religious institutions had complied with all other public safety orders.

Nearly one year later, in the October 14, 2021 order, the trial court granted in part and denied in part Calvary Chapel's motion to dissolve the preliminary injunction. The motion was denied in part because **[***13]** the trial court deemed the preliminary injunction to remain in effect as to all currently operative public health orders relating to COVID-19. The motion was granted as to public health orders "that were at issue at the time that the preliminary injunction was granted but have been rescinded and were, as of the date of the hearing on the Motion, no longer in effect (e.g., holding gatherings indoors, holding outdoor gatherings in excess of 200 people, allowing participants to attend gatherings without maintaining adequate social distance of no less than six feet, allowing singing or chanting at indoor gatherings)."

B. *December 17, 2020 Order of Contempt*

In November 2020 plaintiffs applied for an order to show cause regarding contempt and/or sanctions, in which they alleged that Calvary Chapel had violated the November 2, 2020 temporary restraining order every day since the order issued, and sought an order of contempt, monetary sanctions, and attorney's fees and costs. The alleged violations included indoor gatherings that exceeded the capacity limitations and where the attendees did not wear face coverings, did not socially distance, and sang indoors. Further, plaintiffs asserted that Calvary **[***14]** Chapel had

failed to submit a social distancing protocol.

In opposition, Calvary Chapel argued that the November 2, 2020 temporary restraining order, the November 24, 2020 modified restraining order, and the preliminary injunction were invalid because each order was unconstitutional on its face and could not be the basis for a contempt order. Calvary Chapel maintained that under *Roman Catholic Diocese*, *supra*, 592 U.S. ___, the orders violated the free exercise clause of the First Amendment because the public health orders' restrictions on indoor worship discriminated against churches since the same restrictions did not apply to secular businesses, such as grocery stores and shopping centers.

After issuing an order to show cause and holding a hearing, the trial court issued the December 17, 2020 order of contempt. In the order, the trial court made the following findings of fact: "[Calvary Chapel] willfully violated the [November 2, 2020 temporary restraining order] in contempt of this Court's order every day from November 2, 2020, to November 23, 2020, inclusive, **[*246]** by holding indoor gatherings in excess of applicable capacity limits, permitting indoor gathering attendees to sing, not enforcing or requiring indoor gathering attendees to wear face coverings, not enforcing **[***15]** or requiring indoor gathering attendees to socially distance, and/or not submitting a Social Distancing Protocol to **[**270]** the County of Santa Clara Public Health Department. The Court further finds true the facts from the Declaration of Mike McClure cited by Plaintiffs' counsel regarding Defendant McClure's admission that Defendants have violated the Court's orders and that they intend to

continue to violate the Court's orders."

As also stated in the December 17, 2020 order, the trial court found that the November 2, 2020 temporary restraining order "was a lawful court order which the Court had authority to issue; that [Calvary Chapel] knew of the [temporary restraining order] that [Calvary Chapel was] capable of obeying the[temporary restraining order]; and that despite that ability, [Calvary Chapel] willfully disobeyed the [temporary restraining order] every day from November 2, 2020, to November 23, 2020, inclusive … . The Court further finds that [Calvary Chapel's] violations of its lawful court order were done without good cause or substantial justification."

The trial court therefore found Calvary Chapel to be in contempt of court for violating the November 2, 2020 temporary restraining **[***16]** order. Calvary Chapel was ordered to pay a fine of $1,000 per day pursuant to section 1218, subdivision (a) as penalty for the contempt finding, for a total of a $22,000. Additionally, Calvary Chapel was ordered to pay a fine of $1,500 per day pursuant to section 177.5 as sanctions for violating the November 2, 2020 temporary restraining order, for a total of $33,000.

C. *February 16, 2021 Order of Contempt*

In December 2020 plaintiffs filed an application for an order show cause why Calvary Chapel and the individual defendants, senior pastor Mike McClure and administrative pastor Carson Atherley, should not be held in contempt of court for violating the November 24, 2020 modified restraining order and the December 4, 2020 preliminary injunction. Plaintiffs

sought monetary sanctions and attorneys' fees and costs.

Plaintiffs asserted in their application that the evidence showed that Calvary Chapel's violations included holding numerous indoor gatherings at which attendees did not wear face coverings or socially distance, and sang indoors. They also held several concerts and failed to properly submit a social distancing protocol.

Calvary Chapel opposed the application for an order show cause re contempt and monetary sanctions, arguing **[***17]** that the November 24, 2020 **[*247]** modified restraining order and the December 4, 2020 preliminary injunction were unconstitutional in light of the rulings in *Roman Catholic Diocese*, *supra*, 592 U.S. ___, and *Harvest Rock Church v. Newsom* (2020) 592 U.S. ___ (*Harvest Rock I*), that the public health orders that impose capacity restrictions on worship services, but not on other businesses and activities, are not neutral and therefore violate the free exercise clause of the First Amendment. Calvary Chapel also argued that expert witness testimony could not justify the discriminatory prohibition on indoor worship.

The trial court issued an order to show cause and after a three-day trial, ruled in the February 16, 2021 order that Calvary Chapel, McClure, and Atherley were in contempt of court. As stated in the order of contempt, the trial court found that "that the Calvary Chapel Defendants … willfully violated the modified [temporary restraining order] and [preliminary injunction] order, … . from November 24, 2020, to January 3, 2021, inclusive, by holding indoor gatherings, permitting staff and attendees to sing at

such gatherings, not enforcing or requiring staff and attendees **[**271]** to wear face coverings at such gatherings, not enforcing or requiring staff and attendees to socially distance at such gatherings, and/or not submitting a Social **[***18]** Distancing Protocol to the County of Santa Clara Public Health Department."

The trial court also determined that the decisions in *South Bay United Pentecostal Church v. Newsom* (2021) 592 U.S. ___ and *Harvest Rock Church v. Newsom* (2021) 592 U.S.__, were "distinguishable because the County's public health orders are neutral and restrict all gatherings without reference to purpose." The trial court reasoned that these Supreme Court decisions did not preclude a finding of contempt, since "the contempt findings are based on multiple violations of the County's public health orders that were not disturbed by the Supreme Court … including allowing singing at indoor gatherings, not requiring attendees to wear face coverings or practice social distancing, and not submitting a Social Distancing Protocol."

Additionally, the trial court found that the modified temporary restraining order and preliminary injunction order were lawful court orders that the court had authority to issue, the Calvary Chapel defendants knew of the modified temporary restraining order and preliminary injunction, and the Calvary Chapel defendants were capable of obeying both orders and willfully disobeyed the orders every day from November 24, 2020, to January 3, 2021.

The February 16, 2021 order of contempt also included the following **[***19]** orders regarding fines: (1)

McClure was ordered to pay $15,000 pursuant to section 1218, subdivision (a) as a penalty for the contempt finding and $22,500 pursuant to section 177.5 for violating the modified temporary **[*248]** restraining order and preliminary injunction; (2) Atherley was ordered to pay $11,000 pursuant to section 1218, subdivision (a) as a penalty for the contempt finding and $16,500 pursuant to section 177.5 for violating the modified temporary restraining order and preliminary injunction; and (3) Calvary Chapel was ordered to pay $35,000 pursuant to section 1218, subdivision (a) as penalty for the contempt finding and $52,500 pursuant to section 177.5 for violating the modified temporary restraining order and preliminary injunction; (4) Calvary Chapel was ordered to pay $13,000, suspended, pursuant to section 1218, subdivision (a) as a penalty for the contempt finding (failure to properly submit a completed social distancing protocol); and (5) Calvary Chapel was ordered to pay $19,500, suspended, pursuant to section 177.5 for failure to properly submit a completed social distancing protocol.

III. DISCUSSION

We begin our analysis with a chronological overview of the United States Supreme Court's per curiam opinions and orders that address public health orders arising from the pandemic, since the First Amendment principles that we derive from these rulings **[***20]** govern our review in each of the three cases before us.

A. *Rulings of the United States Supreme Court*

"The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth

Amendment, provides that 'Congress shall make no law … prohibiting the free exercise' of religion." (*Fulton v. Philadelphia* (2021) 593 U.S. ___.) "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest **[**272]** even if the law has the incidental effect of burdening a particular religious practice. [Citation.]" (*Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531.) However, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ""interests of the highest order"" and must be narrowly tailored in pursuit of those interests. [Citations.]" (*Id.* at p. 546.)

During the pandemic, the Supreme Court has considered the First Amendment's protection of the free exercise of religion in the context of state and local public health orders impacting religious practice. In *South Bay United Pentecostal Church v. Newsom* (2020) 590 U.S. ___ **[*249]** (*South Bay I*), the Supreme Court ruled on an application for injunctive relief that would permit **[***21]** the South Bay United Pentecostal Church (South Bay Church) to hold in-person religious services without complying with the state and County of San Diego public health orders placing capacity limitations on religious services. (See *South Bay United Pentecostal Church v. Newsom* (9th Cir. 2020) 959 F.3d 938, 939.)

The Supreme Court denied South Bay Church's

application for injunctive relief. (*South Bay I*, *supra*, 590 U.S. at p. ___.) In his concurring opinion on the court's order, Chief Justice Roberts stated: "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." (*Ibid.*)

A different public health order was at issue in *Roman Catholic Diocese, supra*, 592 U.S. ___. In that per curiam opinion, the Supreme Court considered the executive order of the Governor of New York imposing occupancy limits on attendance **[***22]** at religious services in certain areas classified as "red" or "orange." (*Id.* at p. ___.) The Supreme Court granted the plaintiff religious institutions' application for injunctive relief from the occupancy limits on the grounds that the executive order was not neutral. (*Id.* at p. ___.) Specifically, the high court found that "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment. In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish. And the list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages,

as well as many whose services are not limited to those that can be regarded as essential, … . The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." (*Roman Catholic Diocese, supra*, 592 U.S. at p. ___.) The court emphasized that "even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending **[***23]** religious services, strike at **[**273]** the very heart of the First Amendment's guarantee of religious liberty." (*Id.* at p. ___.)

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In more recent opinions and orders arising from challenges by religious institutions to the constitutionality of public health orders restricting indoor worship services in California, the Supreme Court has indicated that the court does not currently view such orders as neutral and of general applicability despite the restriction applying, as the Chief Justice stated in his concurring opinion in *South Bay I*, "to comparable secular gatherings." (*South Bay I*, *supra*, 590 U.S. at p. ___.)

For example, in *Harvest Rock I*, *supra*, 592 U.S. ___, the lower federal courts denied the application of plaintiff Harvest Rock Church for injunctive relief from enforcement of a public health order's ban on indoor religious services on the grounds that Harvest Rock Church's constitutional claim was unlikely to succeed, since the ban applied to comparable secular indoor gatherings such as lectures and movie theaters. (*Harvest Rock Church v. Newsom* (9th Cir. 2020) 977

F.3d 728, 730.)

Harvest Rock Church sought injunctive relief from the Supreme Court, which in an order remanded the case "to the United States Court of Appeals for the Ninth Circuit with instructions to remand to the District Court for further consideration in light of *Roman Catholic Diocese*[*, supra*,] 592 U.S. ___." (*Harvest Rock Church I*, *supra*, 592 U.S. at p. ___.)

More specific **[***24]** direction was provided by the Supreme Court in a second case involving Harvest Rock Church, *Harvest Rock Church v. Newsom, supra*, 592 U.S. ___ (*Harvest Rock II*), where the Supreme Court granted the church's application for injunctive relief in part in an order, as follows: "Respondent is enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor worship services against the applicants pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit … Application denied with respect to the percentage capacity limitations, and respondent is not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. Application denied with respect to the prohibition on singing and chanting during indoor services. This order is without prejudice to the applicants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner." (*Harvest Rock II*, *supra*, 592 U.S. at p. ___.)

On the same day the Supreme Court issued an order in *Harvest Rock II*, *supra*, 592 U.S. ___, the court issued a nearly identical order in *South Bay United Pentecostal Church v. Newsom, supra*, 592 U.S. ___

(*South Bay II*).) The order states: "Respondents are enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor **[*251]** worship services against the applicants pending disposition **[***25]** of the petition for a writ of certiorari. The application is denied with respect to the percentage capacity limitations, and respondents are not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. The application is denied with respect to the prohibition on singing and chanting during indoor services. This order is without prejudice to the applicants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner." (*Id.* at p. ___.)

[274]** Thereafter, in *Gateway City Church v. Newsom* (2021) 592 U.S. ___ (*Gateway City*), the Supreme Court stated unequivocally in an order that the Ninth Circuit's failure to grant Gateway City Church injunctive relief from the County's ban on indoor gatherings was "erroneous." (*Ibid.*) The Ninth Circuit had ruled that "[t]he challenged ban on indoor 'gatherings' currently in effect for Santa Clara County applies equally to all indoor gatherings of any kind or type, whether public or private, religious or secular. The Directive, which appears to affect far more activities than most other jurisdictions' health measures, does not 'single out houses of worship' for worse treatment **[***26]** than secular activities. [Citation.]" (*Gateway City Church v. Newsom* (9th Cir., Feb. 12, 2021, No. 21-15189) 2021 U.S.App. Lexis 4221.) The Supreme Court granted Gateway City Church's application for injunctive relief, stating in the

order that "[t]he Ninth Circuit's failure to grant relief was erroneous. This outcome is clearly dictated by this Court's decision in [*South Bay II*, *supra*,] 592 U.S. ___ (2021)." (*Gateway City*, *supra*, 592 U.S. at p. ___.)

The next Supreme Court order to arise from a California public health order concerned the orders of the state and the counties of Riverside and San Bernadino that prohibited all public or private indoor gatherings, including church services, but exempted businesses considered essential, such as courts, medical providers, and daycare providers, and also exempted necessary shopping at gas stations and stores. (*Gish v. Newsom* (2021) 592 U.S. ___ (*Gish*).) The district court and the Ninth Circuit denied the plaintiffs' requests for injunctive relief enjoining enforcement of the orders, and the district court then dismissed the action with prejudice. (*Gish v. Newsom* (C.D.Cal., Dec. 11, 2020, No. 5:20-cv-00755-JGB-KK) 2020 U.S.Dist. Lexis 234733; *Gish v. Newsom* (9th Cir., Dec. 23, 2020, Nos. 20-55445, 20-56324) 2020 U.S.App. Lexis 40327.) The plaintiffs applied to the Supreme Court for injunctive relief. In the order, the Supreme Court vacated the district court's dismissal order and remanded the case to the Ninth Circuit with instructions to remand the case to the district court for further consideration in light of *South Bay II*, *supra*, 592 U.S. ___. (*Gish*, *supra*, 592 U.S. ___.)

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The Supreme **[***27]** Court then considered California public health orders restricting private indoor gatherings in a per curiam opinion, *Tandon*, *supra*, 593 U.S. ___. In the underlying action, the district court denied the plaintiffs' motion for a preliminary

injunction enjoining the state and Santa Clara County's public health orders limiting private gatherings to three households. (*Tandon v. Newsom* (9th Cir. 2021) 992 F.3d 916, 917.) The Ninth Circuit similarly denied relief, ruling that "[t]he gatherings restrictions at issue here do not impose a total ban on all indoor religious services, but instead limit private indoor and outdoor gatherings to three households. There is no indication that the State is applying the restrictions to in-home private religious gatherings any differently than to in-home private secular gatherings." (*Id.* at p. 922.)

The United States Supreme Court disagreed and granted the plaintiffs' application for injunctive relief pending appeal, stating that "'[t]he Ninth Circuit's failure to grant an injunction pending appeal was erroneous.'" (*Tandon*, *supra*, 593 U.S. at p. ___.) The court further stated that the plaintiffs were likely to succeed on their free exercise clause claim because (1) "California treats some comparable **[**275]** secular activities more favorably than at-home religious exercise, permitting hair salons, **[***28]** retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time"; and (2) "[T]he Ninth Circuit did not conclude that those activities pose a lesser risk of transmission than *applicants*' proposed religious exercise at home." (*Id.* at p. ___ .)

The Supreme Court concluded in *Tandon* that "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. See [*Harvest Rock II,*

supra,] 592 U.S. ___ (2020); [*South Bay II*], 592 U.S. at p. ___; *Gish*[*, supra,* 592 U.S. ___; *Gateway City*, [*supra*,] 592 U.S. ___. It is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny." (*Tandon, supra*, 593 U.S. at p. ___.)

From these decisions, we understand the United States Supreme Court to hold that where a pandemic-related public health order prohibiting indoor gatherings has the effect of prohibiting indoor worship services, the order is not neutral and of general applicability if the public health order permits any other type of indoor secular activity, notwithstanding that secular indoor gatherings are also banned. Such public health **[***29]** orders are therefore **[*253]** unlikely to satisfy strict scrutiny review under the free exercise clause. (*South Bay II*, *supra*, 592 U.S. ___; *Tandon*, *supra*, 593 U.S. at p. ___.)

We also understand the United States Supreme Court to have now ruled that public health orders placing capacity limitations on indoor public gatherings that have the effect of restricting indoor worship services also are unlikely to satisfy strict scrutiny review under the free exercise clause where the same capacity limitations do not apply to all types of indoor secular activity, notwithstanding that secular indoor gatherings are also restricted. (*Tandon*, *supra*, 593 U.S. at p. ___.) We are mindful that in *Tandon*, the Supreme Court stated that "at-home religious exercise" was comparable for purposes of the free exercise clause to "hair salons, retail stores, personal

care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." (*Tandon*, *supra*, 593 U.S. at p. ___.)

Having reviewed the pertinent United States Supreme Court rulings in the context of pandemic-related public health orders and the free exercise clause of the First Amendment, we now turn to their application in each of the three cases before us. We note that the trial court did not have the benefit of the Supreme Court's most recent guidance when the trial court ruled on the People's applications for an order to show cause regarding contempt and requests for monetary **[***30]** sanctions.

B. *H048708* People v. Calvary Chapel San Jose

On appeal, Calvary Chapel seeks reversal of that portion of the December 17, 2020 order of contempt requiring Calvary Chapel to pay fines totaling $33,000 pursuant to section 177.5 as sanctions for violating the November 2, 2020 temporary restraining order.[4] Calvary Chapel argues **[**276]** that the trial court abused its discretion in ordering payment of fines pursuant to section 177.5 and also committed

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[4] The November 2, 2020 temporary restraining order enjoined Calvary Chapel from "1. Conducting any gathering that does not fully comply with both the State and County public health orders, including but not limited to: holding gatherings indoors in excess of 100 people or 25% of capacity, whichever is less; holding outdoor gatherings in excess of 200 people; allowing participants to attend gatherings without wearing face coverings; allowing participants to attend gatherings without maintaining adequate social distance; and allowing singing at indoor gatherings; [¶] 2. Operating, whether indoors or outdoors, without the prior submission and implementation of a Social Distancing Protocol."

evidentiary error.[5] We will begin our analysis with an overview of section 177.5.

[*254]

1. *Section 177.5*

Section 177.5 provides in part: "A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification."

An order imposing sanctions pursuant to section 177.5 is appealable as a final order on a collateral matter directing the payment of money. (*Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 975–976 [272 Cal. Rptr. 126] (*Caldwell*).) The standard of review for an order imposing monetary sanctions pursuant to section 177.5 is abuse of discretion. (*Caldwell*, at p. 977.) Where "a trial court's decision is influenced by an erroneous understanding of **[***31]** applicable law or reflects an unawareness of the full scope of its

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[5] In its opening brief, Calvary Chapel also argues that the trial court erred in finding Calvary Chapel to be in contempt. However, an order of contempt is not directly appealable. (§ 1222; § 904.1, subd. (a)(2); *Bermudez v. Municipal Court* (1992) 1 Cal.4th 855, 861, fn. 5 [4 Cal. Rptr. 2d 609, 823 P.2d 1210].) Calvary Chapel also argues that the trial court committed evidentiary error in making the contempt ruling on the basis of witness declarations and denying it the opportunity to call live witnesses. We will address Calvary Chapel's contentions regarding the contempt orders in the companion cases, H048734, *Calvary Chapel San Jose v. Superior Court*, and H048947, *McClure v. Superior Court*, *post*.

discretion, it cannot be said the court has properly exercised its discretion under the law. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15–16 [123 Cal. Rptr. 3d 120].)

2. *The Parties' Contentions*

Calvary Chapel does not dispute that it violated the November 2, 2020 temporary restraining order. We understand Calvary Chapel to argue, however, that the trial court abused its discretion in ordering sanctions under section 177.5 because the November 2, 2020 temporary restraining order was not a lawful court order. According to Calvary Chapel, the capacity limitations in the November 2, 2020 order that enjoined Calvary Chapel from "holding gatherings indoors in excess of 100 people or 25% of capacity, whichever is less" are unconstitutional under *Roman Catholic Diocese*, *supra*, 592 U.S. ___, because the capacity limitations were based on the County's October 13, 2020 revised gatherings directive, which applied to churches but "exempted bus stations, airports, grocery stores, restaurants, office buildings, and retail stores."[6] **[**277]** Calvary Chapel also argues

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[6] The County's October 13, 2020 revised gatherings directives states in part: "A gathering does not include, and this Directive does not apply to, normal operations held in childcare settings or preschool, kindergarten, elementary, secondary, or higher education classrooms; areas where people may be in transit (like train stations and airports); or settings in which people are in the same general space at the same time but doing separate activities, like medical offices, hospitals, or business environments like offices, stores, and restaurants where people may be working, shopping, or eating in the same general area but are not gathering together in an organized fashion. A gathering also does not (continued...)

that the public health orders requiring face coverings and social distancing are **[*255]** unconstitutional because those requirements were not applied to some secular activities, such as eating in **[***32]** restaurants. Also, Calvary Chapel asserts that requiring it to submit a social distancing protocol is unconstitutional because it requires Calvary Chapel to adhere to unconstitutional face covering and social distancing requirements and capacity limitations.

The People respond that the capacity limitations and restriction on indoor singing in the November 2, 2020 order were lawful under the relevant legal authority in effect on that date, and point out that Calvary Chapel did not oppose the November 2, 2020 temporary restraining order on the grounds that the face covering, social distancing, and social distancing protocol requirements were unconstitutional. Further, the People argue that the total amount of the sanctions order of $33,000 may be upheld on the basis that Calvary Chapel violated at least one provision of the November 2, 2020 order every day between November 2, 2020 and November 23, 2020.

3. *Analysis*

As we have discussed, we understand the United States Supreme Court in its most recent rulings to have clarified that public health orders placing capacity limitations on indoor public gatherings that have the effect of restricting indoor worship services are unlikely to survive **[***33]** strict scrutiny under

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[6] (...continued)
include internal meetings solely among employees of a single business held at that business's own facility or worksite."

the free exercise clause where the same capacity limitations do not apply to all types of indoor secular activity, notwithstanding that secular indoor gatherings are also restricted. (*South Bay II*, *supra*, 592 U.S. ___; *Tandon*, *supra*, 593 U.S. at p. ___.)

Here, the People do not dispute that the capacity limitations enforced on Calvary Chapel in the November 2, 2020 temporary restraining order do not apply, as Calvary Chapel asserts, to secular bus stations, airports, grocery stores, restaurants, office buildings, and retail stores. Further, the People do not assert that the capacity limitations can satisfy strict scrutiny review, as articulated by the Supreme Court in *Tandon*, *supra*, 593 U.S. at page ___: "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too. [Citations.]"

For these reasons, we determine that under *South Bay II*, *supra*, 592 U.S. ___ and *Tandon*, *supra*, 593 U.S. ___, the November 2, 2020 temporary restraining order that enjoined Calvary Chapel **[*256]** from holding any indoor gathering that did not comply with the capacity limitations of 100 people or 25 percent of capacity is unconstitutional **[***34]** because it discriminates against a religious institution in violation of the free exercise clause of the First Amendment and the County has not satisfied its burden to show that the underlying health order satisfies strict scrutiny.

We need not determine whether the November 2, 2020 temporary restraining order **[**278]** is

unconstitutional with respect to the health order's restrictions on indoor singing and requirements for face coverings, social distancing, and submission of a social distancing protocol. Even assuming, without deciding, that the health order's restrictions on indoor singing and requirements for face coverings, social distancing, and submission of a social distancing protocol might pass constitutional muster, we cannot on this record uphold the sanctions imposed by the trial court. The trial court did not impose discrete fines for violations of the capacity limitations and the violations of the requirements for social distancing, face coverings, and submission of a social distancing protocol but instead imposed a single, aggregate punishment. We will therefore reverse the order of December 17, 2020, requiring Calvary Chapel to pay fines totaling $33,000 in its entirety.

C. *H048734* Calvary Chapel San Jose v. Superior Court

Calvary Chapel filed a petition for review challenging the December 17, 2020 **[***35]** order of contempt, in which the trial court found that Calvary Chapel had violated the November 2, 2020 temporary restraining order every day from November 2, 2020, to November 23, 2020, by "holding indoor gatherings in excess of applicable capacity limits, permitting indoor gathering attendees to sing, not enforcing or requiring indoor gathering attendees to wear face coverings, not enforcing or requiring indoor gathering attendees to socially distance, and/or not submitting a Social Distancing Protocol." Calvary Chapel was also ordered to pay a fine of $1,000 per day pursuant to section 1218, subdivision (a) as penalty for the contempt

finding, for a total of $22,000.

We granted Calvary Chapel's petition for review and allowed further briefing. Calvary Chapel contends that the contempt order must be annulled because the trial court exceeded its jurisdiction in finding Calvary Chapel in contempt for violating an unconstitutional temporary restraining order. Calvary Chapel also contends that the trial court committed evidentiary error by making the contempt ruling on the basis of witness declarations rather than live witness testimony. We will begin our evaluation of these contentions with the requirements for **[***36]** an order of contempt and the applicable standard of review.

[*257]

1. *Requirements for Civil Contempt*

"As the United States Supreme Court has observed, '[i]t is beyond question that obedience to judicial orders is an important public policy. An injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn. [Citations.]' (*W. R. Grace & Co. v. Rubber Workers* (1983) 461 U.S. 757, 766.) [¶] Under California's general contempt law, '[d]isobedience of any lawful judgment, order, or process of the court' is punishable as a civil contempt. (… § 1209, subd. (a)(5).)" (*City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 338–339 [91 Cal. Rptr. 2d 500].)

"'[T]he elements of contempt include (1) a valid order, (2) knowledge of the order, (3) ability to comply with the order, and (4) willful failure to comply with the order. [Citations.]' [Citation.]" (*Wanke, Industrial, Commercial, Residential, Inc. v. Keck* (2012) 209

Cal.App.4th 1151, 1168 [147 Cal. Rptr. 3d 651].) However, "a party may not defend against enforcement of a court order by contending merely that the order is legally erroneous. [Citation.] … [O]nly an erroneous order that is either 'unconstitutional on its face' or 'in excess of **[**279]** the issuing court's jurisdiction' is subject to collateral attack in a later contempt proceeding for violating the order. [Citation.]" (*People v. Sorden* (2021) 65 Cal.App.5th 582, 593–594 [280 Cal. Rptr. 3d 116].)

Regarding monetary sanctions, section 1218, subdivision (a) provides in part: "Upon the answer and evidence taken, **[***37]** the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that the person is guilty of the contempt, a fine may be imposed on the person not exceeding one thousand dollars ($1,000), payable to the court … ." "Where separate contemptuous acts are committed, the contemner can be fined for each offense in the amount authorized by the code. [Citations.]" (*Donovan v. Superior Court* (1952) 39 Cal.2d 848, 855 [250 P.2d 246].) We review an order imposing monetary sanctions pursuant to section 1218, subdivision (a) for abuse of discretion. (See *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698 [96 Cal. Rptr. 3d 172]; *Caldwell, supra*, 222 Cal.App.3d at p. 977 [orders for monetary sanctions generally reviewed under abuse of discretion standard].)

2. *The Parties' Contentions*

Calvary Chapel does not dispute that it violated the November 2, 2020 temporary restraining order, instead contending that the November 2, 2020

temporary restraining order is facially unconstitutional. As Calvary Chapel previously argued on appeal, the capacity limitations in the November 2, **[*258]** 2020 order that enjoined it from "holding gatherings indoors in excess of 100 people or 25% of capacity, whichever is less" are unconstitutional under *Roman Catholic Diocese*, *supra*, 592 U.S. ___, because the capacity limitations were based on the County's October 13, 2020 revised gatherings directive, which applied **[***38]** to churches but exempted "bus stations, airports, grocery stores, restaurants, office buildings, and retail stores."

The People disagree, maintaining that the capacity limitations as applied are constitutional, and asserting that the December 17, 2020 contempt order may be based upon Calvary Chapel's violations of the face covering and social distancing requirements, which Calvary Chapel did not challenge in its writ petition.

3. *Analysis*

Our analysis is governed by the well-established rule that "an order unconstitutional on its face *is* in excess of jurisdiction and cannot sustain a contempt judgment. [Citation.]" (*People v. Gonzalez* (1996) 12 Cal.4th 804, 823 [50 Cal. Rptr. 2d 74, 910 P.2d 1366] (*Gonzalez*).) The California Supreme Court applied this rule in the First Amendment context in *Berry*, *supra*, 68 Cal.2d 137. The contempt order at issue in *Berry* held union members in contempt for violating a temporary restraining order that prohibited the union members from conducting a strike and picketing. (*Id.* at p. 143.) Our Supreme Court ruled that the temporary restraining order violated the union members' First Amendment right to free speech, since

"[i]t is clear that peaceful picketing is an activity subject to absolute constitutional protection in the absence of a valid state interest justifying limitation or restriction. [Citation.]" (*Id.* at p. 152; see *id.* at p. 155.) The court **[***39]** concluded that the temporary restraining order was void on its face as unconstitutionally overbroad and an unnecessary restriction of First Amendment rights, and therefore granted the union members' petition for a writ of habeas **[**280]** corpus. (*Id.* at pp. 150, 157.)

In the present case, we agree with Calvary Chapel that the November 2, 2020 temporary restraining order is unconstitutional on its face as to that portion of the order that compelled Calvary Chapel to comply with the public health order's capacity limitations on indoor gatherings. As we have discussed, under *South Bay II*, *supra*, 592 U.S. ___ and *Tandon*, *supra*, 593 U.S. ___, we determine the portion of the November 2, 2020 temporary restraining order that enjoined Calvary Chapel from holding any indoor gathering that did not comply with the capacity limitations of 100 people or 25 percent of capacity is unconstitutional because it discriminated against a religious institution in violation of the free exercise clause of the First Amendment.

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Moreover, even assuming, without deciding, that the November 2, 2020 temporary restraining order is not unconstitutional on its face with respect to the violations of the health order's restrictions on indoor singing and requirements for face coverings, social distancing, and submission of a social distancing protocol, we cannot on this record **[***40]** uphold the

December 17, 2020 contempt order. (See, e.g., *Roman Catholic Diocese*, 592 U.S at p. ___; *South Bay II*, *supra*, 592 U.S at p. ___ (conc. opn. of Gorsuch, J.).) As the trial court imposed a single, aggregate sanction for violation of the temporary restraining order, we must therefore annul the December 17, 2020 order of contempt in its entirety.

4. *Evidentiary Error*

Calvary Chapel contends that another basis for annulling the December 17, 2020 contempt order is the violation of procedural safeguards that occurred during the contempt hearing, consisting of the admission of the County's evidence solely on the basis of witness declarations over Calvary Chapel's objections. According to Calvary Chapel, this evidentiary error violated its constitutional right to confront and cross-examine witnesses in a criminal proceeding, including a quasi-criminal contempt proceeding.

The People respond that the trial court advised the parties prior to the contempt hearing that the court wanted them to submit on the papers as much as possible, that Calvary Chapel did not request the County to produce its witnesses or subpoena any witnesses, and therefore Calvary Chapel has waived any objection. The People also assert that the claimed error was harmless in any event since **[***41]** the facts of Calvary Chapel's violations of the November 2, 2020 temporary restraining order were undisputed.

Our review of the record shows that at the outset of the December 8, 2020 hearing on the order to show cause regarding contempt for Calvary Chapel's violation of the November 2, 2020 temporary

restraining order, Calvary Chapel objected to the County submitting its evidence by way of witness declarations and argued that Calvary Chapel had a constitutional right to confront its accusers. The trial court overruled the objection after confirming that the court had requested that the matter proceed on the papers and had encouraged the parties to meet and confer with regard to witnesses. The court also confirmed with Calvary Chapel's counsel that Calvary Chapel had never asked the County to bring witnesses and had never attempted to subpoena any County witnesses.

We determine that even assuming, without deciding, that Calvary Chapel had a constitutional right under the Sixth Amendment to confront the County's witnesses **[**281]** at the contempt hearing, and that the County was **[*260]** obligated to provide live witnesses without any action on Calvary Chapel's part, Calvary Chapel has forfeited that right. It is axiomatic **[***42]** that "a right may be lost not only by waiver but also by forfeiture, that is, the failure to assert the right in timely fashion. [Citations.]" (*People v. Barnum* (2003) 29 Cal.4th 1210, 1224 [131 Cal. Rptr. 2d 499, 64 P.3d 788].) Our Supreme Court has further stated: "'"No procedural principle is more familiar to this Court than that a *constitutional* right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." …' [Citation.]" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264 [92 Cal. Rptr. 3d 862, 206 P.3d 403].)

Here, it is apparent that Calvary Chapel did not timely

assert that it had a constitutional right to confront the County's witnesses that would be violated by the contempt hearing proceeding solely on the basis of witness declarations. It is undisputed that the trial court requested the parties to proceed by way of declarations as much as possible, encouraged the parties to meet and confer with respect to witnesses, and that Calvary Chapel took no action to procure the attendance of the County's witnesses. Further, Calvary Chapel did not object to the contempt hearing proceeding by way of declarations, rather than live witnesses, until the day of the hearing. We therefore conclude that Calvary Chapel **[***43]** has forfeited its claim of an evidentiary error that violated its constitutional right to confrontation, and therefore the claimed error does not provide a basis for annulling the December 17, 2020 contempt order.

In the reply brief and during oral argument, Calvary Chapel additionally contended that its right to due process was violated at the contempt hearing because it was "denied the right to call their own witnesses," and that "Mike McClure and other expert witnesses were prepared for testimony." We ordinarily do not consider issues raised for the first time in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764–765 [60 Cal. Rptr. 2d 770].) We will address the issue, however, because our review of the record shows that Calvary Chapel is incorrect. The reporter's transcript for the December 8, 2020 contempt hearing includes the following colloquy:

"THE COURT: I'll turn it over to Defendants now.

"MR. TYLER: Thank you, Your Honor. [¶] I am not calling any witnesses, Your Honor,"

Accordingly, Calvary Chapel's due process contention lacks merit since Calvary Chapel was not denied the right to call its own witnesses at the December 8, 2020 contempt hearing.

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D. *H048947* McClure v. Superior Court

Calvary Chapel and individual defendants McClure and Atherley **[***44]** petitioned for review of the February 16, 2021 order of contempt, in which the trial court found that the Calvary Chapel defendants willfully violated the November 24, 2020 modified temporary restraining order and the preliminary injunction order from November 24, 2020, to January 3, 2021, by holding indoor gatherings, permitting singing at the gatherings, not enforcing or requiring face coverings at the gatherings, not enforcing or requiring socially distancing at the gatherings, and not submitting a social distancing protocol to the County of Santa **[**282]** Clara Public Health Department.[7] The February 16, 2021 order also imposed monetary sanctions on Calvary Chapel, McClure, and Atherley

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[7] The November 24, 2020 modified temporary restraining order enjoined Calvary Chapel from the following: "1. Conducting any gathering that does not fully comply with both the State and County public health orders, including but not limited to, complying with prohibitions on: holding gatherings indoors; holding outdoor gatherings in excess of 200 people; allowing participants to attend gatherings without wearing face coverings; allowing participants to attend gatherings without maintaining adequate social distance of no less than six feet; allowing singing or chanting at indoor gatherings; and [¶] 2. Operating, whether indoors or outdoors, without the prior submission and implementation of a Social Distancing Protocol."

under section 1218, subdivision (a) and section 177.5.

We granted the petition for review and allowed further briefing. In its petition, Calvary Chapel argues that the February 16, 2021 order of contempt must be annulled because the violations of the November 24, 2020 modified temporary restraining order and the preliminary injunction by Calvary Chapel, McClure, and Atherley cannot be the basis for a contempt finding because the orders are unconstitutional. They also argue that the contempt order must be annulled because the trial court committed evidentiary **[***45]** error by excluding the testimony of Dr. Cody.

1. *February 16, 2021 Order of Contempt*

Calvary Chapel contends that holding indoor religious services in violation of the November 24, 2020 modified temporary restraining order and the preliminary injunction cannot be the basis for a contempt order because the United States Supreme Court has ruled in several cases that a ban on indoor religious services violates the free exercise clause. Calvary Chapel also contends that the ban on indoor singing and the requirements for face coverings, social distancing, and submission of a social distancing protocol are unconstitutional because they are not neutral and of general applicability, and therefore cannot be the basis of a contempt order.

The People disagree, arguing that both the November 24, 2020 modified temporary restraining order and the preliminary injunction were issued within **[*262]** the trial court's authority and as such were not void and may be the basis for a contempt order. Additionally, the People argue that the orders were not facially

unconstitutional because no court has found that either the singing ban or the requirements for face coverings, social distancing, and submission of a social distancing protocol **[***46]** are unconstitutional. According to the People, even if the orders' ban on indoor religious services is deemed facially unconstitutional, the February 16, 2021 contempt order may stand on the violations of the requirements for face coverings, social distancing, and submission of a social distancing protocol.

We agree with Calvary Chapel that, as we have discussed, under the most recent Supreme Court rulings the prohibition on indoor gatherings in the November 24, 2020 modified restraining order and the preliminary injunction that effectively prohibited indoor worship services, while allowing certain secular indoor activities to occur, is unconstitutional on its face as a violation of the free exercise clause. (See *South Bay II*, *supra*, 592 U.S. ___; *Tandon*, *supra*, 593 U.S. at p. ___.) Therefore, the February 16, 2021 order of contempt cannot be sustained on the basis that Calvary Chapel, McClure and Atherley violated the orders by holding indoor religious services and other indoor gatherings. (See *Gonzalez*, *supra*, 12 Cal.4th at p. 823; **[**283]** *Berry*, *supra*, 68 Cal.2d at pp. 150, 157.)

Further, as we have discussed, although the Supreme Court has not granted injunctive relief as to a challenge to a singing ban in a pandemic-related public health order, and has not directly addressed other pandemic-related public health measures such as face coverings and **[***47]** social distancing in its rulings, we need not determine whether the contempt order

may be sustained on that ground. (See, e.g., *Roman Catholic Diocese, supra*, 592 U.S at p. ___; *South Bay II*, *supra*, 592 U.S at p. ___ (conc. opn. of Gorsuch, J.).) On the record before us, it is not possible to separate Calvary Chapel's violations of the prohibition on indoor gatherings from the violations of the restrictions on indoor singing and requirements for social distancing, face coverings, and submission of a social distancing protocol. We will therefore reverse the February 16, 2021 order of contempt in its entirety.

2. *Evidentiary Error*

During the hearing held on the order to show cause regarding contempt, the trial court denied Calvary Chapel's request to have Dr. Cody, the County's public health officer, appear and testify regarding the County's public health orders, and also excluded Dr. Cody's declaration from evidence. The trial court determined that Dr. Cody's testimony was not relevant to the issue at bar of whether Calvary Chapel, McClure, and Atherley had willfully violated the November 24, 2020 modified temporary restraining order and the **[*263]** preliminary injunction, which the court had previously determined were valid, constitutional orders. Calvary Chapel contends that the trial court erred in excluding Dr. Cody's **[***48]** testimony and declaration and the evidentiary error is another basis for annulling the February 16, 2021 order of contempt.

In *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229 [88 Cal. Rptr. 3d 186] (*Shaw*), this court stated the applicable standard of review: "We review a trial court's evidentiary rulings for abuse of

discretion. [Citation.] This is particularly so with respect to rulings that turn on the relevance of the proferred evidence. [Citation.] … . Discretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' [Citation.] There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. [Citation.] A trial court will abuse its discretion by action that is arbitrary or "'that transgresses the confines of the applicable principles of law.'" [Citations.] In appeals challenging discretionary trial court rulings, it is the appellant's burden to establish an abuse of discretion." (*Id.* at p. 281.)

According to Calvary Chapel, "[t]he examination of Dr. Cody was necessary to determine whether the County could have implemented less restrictive orders to avoid the infringement of religious liberties. Dr. Cody would also have been questioned on **[***49]** the neutrality and general applicability of the orders. This determination is directly relevant to whether the public health orders were constitutional."

The People argue that the trial did not abuse its discretion because Dr. Cody's testimony was not relevant to the issue of the validity of the November 24, 2020 modified temporary restraining order and the preliminary injunction.

We determine that even assuming, without deciding, that the trial court abused its discretion in excluding the testimony and declaration of Dr. Cody, the error was not prejudicial since we have concluded, as discussed above, that the February 16, 2021 **[**284]** order of contempt must be annulled in its entirety.

(See *Shaw*, *supra*, 170 Cal.App.4th at p. 281.) Accordingly, we conclude in the absence of prejudicial error that Calvary Chapel's claim of evidentiary error lacks merit.

IV. DISPOSITION

In H048708, *People v. Calvary Chapel San Jose*, the December 17, 2020 order requiring payment of monetary sanctions is reversed. The parties shall bear their own appellate costs.

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In H048734, *Calvary Chapel San Jose v. Superior Court*, the December 17, 2020 order of contempt is annulled in its entirety. The parties shall bear their own appellate costs.

In H048947, *McClure* **[***50]** *v. Superior Court*, the February 16, 2021 order of contempt is annulled in its entirety. The parties shall bear their own appellate costs.

Bamattre-Manoukian, J., and Danner, J., concurred.

APPENDIX D

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE et al.,
Plaintiffs and Respondents,

v.

CALVARY CHURCH SAN JOSE et al.,
Defendants and Appellants.

H051860
Santa Clara County Super. Ct. No. 20CV372285

BY THE COURT*:

Appellants' petition for rehearing is denied.

Date: 05/06/2025

/s/ Mary J. Greenwood P.J.

*Before Greenwood, P.J. Danner, J. and Wilson. J

APPENDIX E

People v. Calvary Chapel San Jose

Supreme Court of California

July 16, 2025, Opinion Filed

S291092

2025 Cal. LEXIS 4419 *; 2025 LX 277929

Opinion

The request for judicial notice is granted.

The petition for review is denied.