No. 20A138

IN THE
Supreme Court of the United States

GATEWAY CITY CHURCH, ET AL.,
Plaintiffs-Applicants,
v.
GAVIN NEWSOM, ET AL.,
Defendants-Respondents.

OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, FOR CERTIORARI BEFORE JUDGMENT OR SUMMARY REVERSAL

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QUESTION PRESENTED BY APPLICANTS' REQUEST IN THE ALTERNATIVE FOR CERTIORARI BEFORE JUDGMENT

Does the First Amendment compel the County of Santa Clara to create a special religious exemption for indoor worship gatherings from its uniform, temporary prohibition on all indoor gatherings of any kind or type, whether public or private, religious or secular?

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INTRODUCTION

The County of Santa Clara and County Health Officer Dr. Sara Cody (collectively, the "County") have issued content-neutral public health restrictions prohibiting indoor gatherings of all kinds, regardless of purpose—secular or religious—to thwart the most deadly pandemic in more than a century. The public health restrictions at issue are fundamentally different from the other COVID-19 restrictions this Court has considered. The County has carefully crafted its public health directives to conform to the evolving science and scale of the pandemic and to respect the Constitution's commands. These public health directives do not impose special restrictions on religious institutions. Nor do they single out or impose unique burdens on religious gatherings. Instead, they prohibit *all* indoor gatherings of *all* kinds at *all* places.

Under these carefully calibrated directives, places of worship are *not* closed or limited to 0% capacity, as Applicants falsely assert. The County's directives allow religious and secular establishments alike to operate at 20% capacity for any purpose other than hosting gatherings. Thus, individuals can enter religious facilities—and throughout this pandemic have done so—to pray, go to confession, seek spiritual guidance, make offerings or donations, purchase or obtain religious items, manage administrative affairs, or engage in any other non-gathering activity. Critically, retail stores and other secular establishments are subject to precisely the same rules as religious facilities: shoppers may purchase items indoors, for instance, but they cannot attend an indoor gathering such as a book reading,

product demonstration, or presentation when visiting stores and other secular establishments. The County's directives, in short, apply the exact same rules across the board, regardless of purpose, whether an activity is secular or religious, at a church or in a store.

Applicants insist that *South Bay United Pentecostal Church v. Newsom* ("*South Bay II*"), 141 S. Ct. 716 (2021) (Mem), controls the outcome here. It does, but not for the reason they suggest. Applicants rely on the holding and analysis in *South Bay II* that enjoined the State of California's prohibition on indoor worship on the ground that it singled out places of worship and imposed restrictions on worship activities that were not generally applicable to other similar activities. That holding and analysis do not apply here because the County has no restrictions that are specific to religious worship services or religious facilities. Although the County's restrictions on indoor gatherings mention worship services as one example of a "gathering"—alongside many others, such as conferences, movie showings, political events, and banquets—those restrictions apply equally to *any* indoor gathering, whether religious or secular in nature.

Applicants ignore the analysis in *South Bay II* that does control in this case. Six Justices declined to enjoin California's generally applicable ban on singing. Justice Barrett, joined by Justice Kavanaugh, wrote separately to explain why: "As the case comes to us, it remains unclear whether the singing ban applies across the board (and thus constitutes a neutral and generally applicable law) or else favors certain sectors (and thus triggers more searching review)." *Id.* at 717 (Barrett, J.,

concurring). In other words, restrictions that apply "across the board" are neutral and generally applicable, and therefore subject to rational basis review. That analysis applies here because the County's indoor gathering rules apply to all and favor none.

Grasping for a different result, Applicants argue that the County has played favorites by allowing airline passengers to come together at gates when they board and deplane their flights at the Mineta San José International Airport. This sole purported example of non-neutrality is a red herring. *First*, contrary to Applicants' assertions, both the prohibition on indoor gatherings and the 20% capacity restriction *do* apply to the airport—just as they apply to all other facilities open to the public. *Second*, Applicants ignore that the airport is a multi-jurisdictional transit hub subject to superseding Federal Aviation Administration ("FAA") control. Although the County has imposed its gathering and capacity directives on airports, just as on other facilities, the County likely lacks the authority to apply those directives to prohibit or restrict activity in the airport necessary for travelers to board and deplane flights safely (even assuming such activity constituted a gathering). *And third,* Applicants fail to acknowledge that air travel is subject to an additional and critical restriction: the County imposes a mandatory 10-day quarantine for travelers entering Santa Clara County. In other words, boarding and deplaning for air travel is simply not a comparable activity and certainly cannot be compared without considering all applicable restrictions, including the stringent 10-day quarantine requirement.

The County's indoor gathering prohibition is not only neutral and generally applicable, but also dynamic and tailored to the real-time public health risk posed by COVID-19. As the risks diminish, the County will uniformly relax restrictions on gatherings. Indeed, that is precisely what the County did when it allowed indoor gatherings for much of October and early November when the County's seven-day average case rates dipped below 5 per 100,000. Unfortunately, and likely due to indoor gatherings over the holidays, the County's seven-day average case rates in late November, December, and January shot up by more than 2,000%, accompanied by a precipitous decline in ICU capacity to 5.4% and impending hospital crisis absent immediate reductions in transmission. The County's reinstatement of its across-the-board restrictions on indoor gatherings in November 2020 helped mitigate that acute crisis. Due in large part to these efforts, the most recent surge is abating, and as the County continues to vaccinate more and more of its residents, it anticipates uniformly relaxing restrictions on all indoor gatherings again in the next few weeks.

The County's experience in managing the pandemic merits note. Just over one year ago, Santa Clara County was "ground zero" for the COVID-19 pandemic in the United States. It suffered the very first death from COVID-19 recorded in the country on February 6, 2020, and weathered one of the earliest outbreaks shortly thereafter. On March 16, 2020, along with six neighboring jurisdictions, the County issued the nation's first shelter-in-place order to head off a much more explosive outbreak. That early action saved thousands of lives. But the danger has not

passed. Case and death rates remain high, and new and more dangerous variants of the virus have begun circulating locally.[1] The County urges the Court to deny the Application so that the County may continue to take the carefully calibrated public health measures necessary to keep the pandemic at bay locally while the benefits of vaccination take hold.

STATEMENT

I. Factual Background

This appeal challenges health orders put in place by the County Health Officer to stem the spread of COVID-19 by temporarily prohibiting indoor gatherings. The County's Mandatory Directive for Gatherings ("Gatherings Directive") imposes risk-reduction requirements on *all* gatherings. The same requirements apply whether a gathering is secular or religious, as illustrated by the content-neutral definition for gathering:

> A "gathering" is an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, party, performance, competition, movie theater operation, barbecue, protest, or picnic.

Respondents' Ex. 1, Gatherings Directive at 2.

[1] *See* Press Release, County of Santa Clara Emergency Operations Center, First Two Cases of South African Variant Identified in California; Detected in Santa Clara and Alameda Counties (Feb. 10, 2021), https://tinyurl.com/1t6n8vqo; Press Release, County of Santa Clara Emergency Operations Center, COVID-19 Variant First Found in Other Countries and States Now Seen More Frequently in California (Jan. 17, 2021), https://tinyurl.com/548vteto.

The County's Mandatory Directive on Capacity Limitations ("Capacity Directive") places limitations on businesses and activities based on their risk profiles. *See* Application Ex. E, Capacity Directive. The risks depend on several factors, including the type, location, size, and duration of an activity. Respondents' Ex. 2, Cody Decl. ¶ 14. SARS-CoV-2, the virus that causes the COVID-19 disease, spreads mainly through respiratory droplets and smaller aerosols that individuals expel when talking, singing, breathing, coughing, and sneezing. *Id.* ¶¶ 9, 11–12, 34–35, 38–40, 61; Respondents' Ex. 3, Lipsitch Decl. ¶ 38. Transmission risk increases indoors because infected droplets and aerosols dissipate less quickly indoors compared to outdoors. Cody Decl. ¶¶ 34–36; Lipsitch Decl. ¶¶ 38–40. Larger groups also create greater risks because they are more likely to contain infectious individuals and pose a larger risk of broad secondary spread in the community. Cody Decl. ¶ 37; Lipsitch Decl. ¶ 41. Finally, the longer individuals come together, the more likely droplets and aerosols with virus particles accumulate at higher concentrations and, thus, the more likely a person is to become infected. Cody Decl. ¶ 11; Lipsitch Decl. ¶¶ 39–40.

The Capacity Directive currently bars all indoor gatherings because such gatherings present a unique confluence of high-risk factors that the science has shown facilitate transmission: large groups from different households socializing together indoors and remaining in close proximity for extended periods of time. Cody Decl. ¶¶ 11–12, 14, 34–40, 54; Lipsitch Decl. ¶¶ 38–42. It is because of this combination of risk factors that so many outbreaks and superspreader events have

been tied to indoor gatherings. *See* Cody Decl. ¶ 41. Indoor worship gatherings—like other gatherings such as concerts, conferences, banquets, theater performances, and movie showings—generate these risks. However, non-gathering activities such as retail and grocery shopping do not generate these risks to the same degree because they generally involve only transitory, short-duration contacts between individual shoppers or staff. *Id.* ¶ 55; Lipsitch Decl. ¶ 39. For example, passing another shopper in an aisle, waiting in a check-out line, or paying for an item at a cash register have far lower risk profiles than remaining seated or socializing near a fellow attendee at an indoor gathering for a long period of time. *See id.*

Maintaining at least six feet of social distance and using face coverings reduces but does not eliminate transmission risks. Cody Decl. ¶¶ 11–12, 14, 38, 61; Lipstich Decl. ¶ 45. Thus, public health experts, as well as the federal Centers for Disease Control and Prevention, recommend a layered approach to risk-mitigation that includes, for example, universal mask-wearing policies, social distance requirements, and restrictions on "indoor spaces that pose the highest risk for transmission." Cody Decl. ¶¶ 13–14, 65; Lipsitch Decl. ¶¶ 47–48. The County's Gatherings Directive and Capacity Directive reflect this layered approach and calibrate public health restrictions to the degree of risk posed by an activity. The Capacity Directive permits outdoor gatherings but has prohibited all indoor gatherings since November 17, 2020, when the County's case rate and positivity rate began to worsen precipitously. Capacity Directive at 2; Gatherings Directive at 1–2; Cody Decl. ¶ 69. The Capacity Directive similarly prohibits other indoor

activities that pose high risk of transmission. For example, the County currently prohibits all indoor public access at gyms, restaurants (except for take-out), bars, wineries, smoking lounges, entertainment centers, and recreational facilities. Capacity Directive at 2–4.

Underscoring the County's calibrated response, the Capacity Directive does not prohibit all indoor activities at facilities where gatherings occur. Thus, transient, uncoordinated, or one-on-one activities may still occur at such facilities (and have always been permitted to occur throughout the pandemic by the County) because the nature of these non-gathering activities poses a lower risk of transmission. Like almost every other type of facility currently open to the public (only healthcare and lodging facilities are exempt), places of worship may operate at 20% indoor capacity. *See id.* at 4. Indeed, the County Public Health Department's Frequently Asked Questions webpage includes the following: "Are places of worship allowed to open in Santa Clara County?" The response states: "The County does not have, and never has had, any guidance or rules specific to 'places of worship.' [¶] All facilities open to the public, including places of worship, are open at 20% capacity under the County's Capacity Directive." *See* Public Health Orders FAQs, https://tinyurl.com/17v71kg9. Accordingly, the County has long permitted religious facilities—like any other facility open to the public—to operate indoors for non-gathering purposes, including activities such as prayer, confession, counseling, purchasing or obtaining religious items, performing volunteer work, or carrying out administrative work.

II. Procedural Background

On December 9, 2020, Applicants moved for a preliminary injunction against both the California and County orders as applied to indoor religious gatherings. The County and State opposed Applicants' motion, and the district court heard argument on January 15, 2021. In support of its directives, the County presented evidence regarding the then-dire state of the pandemic—including surging case numbers and dwindling ICU capacity—and the consensus opinions of epidemiology and public health experts, described above, that indoor gatherings are among the activities most likely to spread COVID-19. *See supra* at 6–7.

On January 29, 2021, the district court granted in part and denied in part Applicants' motion for a preliminary injunction. *See* Application Ex. D, Jan. 29 Order. As to the County's directives, the district court denied the motion in full. The district court explained that because the County's directives are "entirely neutral toward religion" and "generally applicable to any gathering—religious or secular," they are subject to rational basis review. *Id*. at 27. The court concluded that the directives satisfy that standard, explaining: "gatherings of people from multiple households, particularly indoors, carry a high risk of transmission. Preventing people from gathering indoors and limiting the number of people permitted to gather outdoors rationally furthers the legitimate goal of slowing transmission of the virus." *Id*. at 28. As to California's orders, the district court enjoined certain numerical limits on attendance at places of worship, but left in

place both the percentage-based capacity limits and the complete ban on indoor worship gatherings. *Id.* at 29–30.

Applicants filed a notice of appeal from the district court's order on February 1, 2021. The next day, they filed an emergency motion in the district court to enjoin enforcement of the County's directives (as well as the State restrictions not already enjoined) pending their appeal. On February 8, 2021, in response to *South Bay II* but without complete briefing, the district court enjoined the County from enforcing its indoor gatherings prohibition against indoor worship services. Application Ex. C, Feb. 8 Order at 3–4. The district court reversed itself on the merits of its prior order—by then already on appeal to the Ninth Circuit—and held that strict scrutiny was "likely" to apply to the County's gathering restrictions. *Id.* In reaching this conclusion, the district court relied on Justice Gorsuch's statement in *South Bay II*, joined by Justice Thomas and Justice Alito, which would have applied strict scrutiny to a different restriction—the State's prohibition on all indoor singing. *Id.*

On February 9, 2021, the County moved for reconsideration. The County pointed the district court to Justice Barrett's concurring opinion in *South Bay II*, joined by Justice Kavanaugh, which explained that in the absence of evidence to the contrary, California's singing prohibition was a neutral and generally applicable restriction not subject to heightened scrutiny. Four other Justices also voted to leave the singing prohibition undisturbed. The next day, the district court granted

the County's request, stayed its February 8 order, and set a briefing schedule on the motion for reconsideration. *See* Application Ex. B, Feb. 10 Order.[2]

Applicants filed an emergency motion before the Ninth Circuit on February 11, 2021, which the County opposed. The Ninth Circuit denied Applicants' motion on February 12, 2021, on the grounds that they had not shown a sufficient likelihood of success on the merits to warrant injunctive relief pending appeal. *See* Application Ex. A, Ninth Circuit Order. Applying this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Court of Appeals held that the County's Capacity Directive "does not 'single out houses of worship' for worse treatment than secular activities" because the prohibition on gatherings "applies equally to all indoor gatherings of any kind or type, whether public or private, religious or secular" and does not affect whether Applicants "may continue to remain open for purposes that do not involve 'gatherings.'" Ninth Circuit Order at 2 (first quoting *Cuomo*, 141 S. Ct. at 66). On that basis, the Court of Appeals concluded that Applicants had not shown that the district court "likely erred in determining that the County's prohibition on indoor gatherings is a neutral law of general applicability and therefore properly subject to rational basis review." *Id.* (citing *South Bay II*, 141 S. Ct. at 717 (Barrett, J., concurring)).

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[2] During the brief period when the district court's February 8 order was in effect, the County exempted indoor worship gatherings from its otherwise neutral and generally applicable ban on all indoor gatherings. After the district court stayed that order on February 10, the County revised its directives again to prohibit all indoor gatherings uniformly.

Applicants filed the instant emergency application with this Court five days later, on February 17, 2021.

ARGUMENT

Applicants seek extraordinary relief: an injunction issued in the first instance by this Court. To obtain such relief, Applicants must show that "'the legal rights at issue are *indisputably clear*.'" *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (quoting *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers)) (emphasis added). Such an injunction "'demands a significantly higher justification' than that required for a stay" because an injunction "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Id.* (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

In addition, Applicants must show that they satisfy each of the following four elements: they are "likely to succeed on the merits," they are "likely to suffer irreparable harm in the absence of preliminary relief," "the balance of equities tips in [their] favor," and "an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where, as here, the government is a party, the balance of equities and public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

I. Applicants Have Not Established a Clear Right to Relief Because the County's Uniform Directives Prohibit All Indoor Gatherings

The County does not regulate places of worship—it regulates gatherings. Contrary to Applicants' assertions, *South Bay II* supports the lower courts' reasoning: like California's across-the-board singing ban, which both this Court and the Court of Appeals declined to enjoin, the County's restrictions on indoor gatherings are neutral and generally applicable. Thus, the County's public health restrictions on indoor gatherings differ fundamentally from the restrictions specifically applicable to places of worship that this Court enjoined in *South Bay II*. Those differences are dispositive: the County's across-the-board restrictions are subject to rational basis review, a standard that they readily satisfy.

Even if strict scrutiny were to apply to the County's restrictions on indoor gatherings, though, the restrictions would withstand that review because they are dynamic and narrowly tailored to stem the spread of COVID-19. For these reasons, Applicants are unlikely to succeed on the merits of their claims and cannot establish a clear right to relief.

A. The County's Directives Are Subject to Rational Basis Review

1. Neutral and Generally Applicable Public Health Restrictions Are Subject to Rational Basis Review

While Free Exercise Clause jurisprudence applicable to public health restrictions has evolved over the course of the COVID-19 pandemic, the key principles remain clear. In determining whether a law prohibits the free exercise of religion, courts ask whether the law is "'neutral' and of 'general applicability.'"

Cuomo, 141 S. Ct. at 67 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993)).

A law is not neutral and generally applicable, and is thus subject to strict scrutiny, if it imposes different restrictions on religious activities as compared to non-religious activities. *Id.* at 66–67. By contrast, "tailored restrictions—even very strict restrictions—on attendance at *religious services and secular gatherings alike*" are well within the government's authority and subject only to rational basis review. *See id.* at 74 (Kavanaugh, J., concurring) (emphasis added); *see also South Bay II*, 141 S. Ct. at 717 (Barrett, J., concurring) (explaining that a "ban [that] applies across the board" would "constitute[] a neutral and generally applicable law"). As addressed below, unlike California or other states, the County imposes identical restrictions on religious and secular gatherings alike. The County's prohibition on indoor gatherings is thus fundamentally different from the restrictions this Court considered in *Cuomo* and *South Bay II*, which applied expressly and specifically to places of worship.

In *Cuomo*, for example, places of worship sought relief from the New York Governor's executive order that specifically placed attendance caps on religious services—up to 10 people in "red zones" and up to 25 people in "orange zones"—but not "essential businesses" in either zone or even "non-essential businesses" in orange zones. 141 S. Ct. at 66–67. This "striking" "disparate treatment" led this Court to conclude that New York's attendance restrictions "single out houses of worship for especially harsh treatment" and trigger strict scrutiny. *Id.* at 66.

Applying *Cuomo*, the Ninth Circuit in *South Bay I* considered the constitutionality of the State of California's Regional Stay at Home Order and Tier 1 of the Blueprint for a Safer Economy, which assigns every county in California to a tier based on its COVID-19 test positivity and adjusted case rate and expressly and specifically prohibits indoor worship services. Although California's rules subject a variety of sectors to the same or more stringent restrictions than places of worship, the Ninth Circuit found that these rules result in "'disparate treatment' of religion" sufficient to trigger strict scrutiny because they simultaneously subject certain other secular sectors to less stringent restrictions. *South Bay United Pentecostal Church v. Newsom* ("*South Bay I*"), 985 F.3d 1128, 1141 (9th Cir. 2021) (citation omitted).[3]

2. The County's Public Health Orders Are Neutral and Generally Applicable

Unlike New York and California, the County has long treated religious facilities the same as secular facilities, and religious gatherings the same as secular gatherings. In fact, the County's framework is entirely different than the framework applied by those states: it does not target any particular sector, but instead provides a uniform set of rules applicable to a particular activity—gatherings—that presents a unique confluence of high-risk factors. Under this Court's most recent pronouncement—according to which a public health order is neutral and generally applicable when its restrictions "appl[y] across the board"—

[3] This Court's order in *South Bay II* does not purport to disturb the Ninth Circuit's analysis regarding the level of scrutiny applicable to California's prohibition on indoor worship gatherings.

the County's restrictions on indoor gatherings elicit rational basis review. *See South Bay II*, 141 S. Ct. at 117 (Barrett, J., concurring).

The County's Capacity Directive imposes the same capacity limit on *all* facilities open to the public except for healthcare facilities and lodging facilities (for separate, temporary living quarters, many of which are used to isolate or quarantine after COVID-19 exposure).[4] Thus, places of worship are open to the public at 20% capacity for any purpose other than gatherings, including religious activities like "pray[ing] in solitude" and "go[ing] to confession," *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.), one-on-one counseling, making an offering, obtaining a religious item, volunteering for community service, or managing administrative affairs. This is the *same* limitation that applies to the grocery and retail stores, personal care businesses, public transit waiting areas, "non-essential" limited services, government buildings, and "other facilities" that Applicants point to, *see* Application at 13; *see also* Capacity Directive at 4 (listing 20% indoor capacity limitation for "Any Other Facility Allowed to Open to the Public Under

[4] Of course, healthcare providers are familiar with and obligated to use multi-layered, head-to-toe personal protective equipment and follow strict, mandated hygiene procedures to minimize disease transmission. And lodging facilities in Santa Clara County are subject to the stringent requirements in the County's Mandatory Directive for Lodging Facilities (Including Hotels and Motels), which also prohibit any non-essential lodging. *See* County of Santa Clara Public Health Dep't, *Mandatory Directive for Lodging Facilities (Including Hotels and Motels)* (July 10, 2020; last rev'd Dec. 14, 2020), https://www.sccgov.org/sites/covid19/Documents/Mandatory-Directives-Lodging.pdf.

State and Local Orders," which includes places of worship); Gatherings Directive at 3 ("[F]acilities that are typically used for gatherings . . . may remain open for purposes that do not involve gatherings, even when gatherings are prohibited indoors."); Public Health Order FAQ, *supra* at 8. Applicants thus patently misstate the facts on the ground when they assert that the County's directives "have left church buildings abandoned," Application at 19, and that the facilities they list receive "preferential treatment," *id.* at 13–14.[5]

In addition, the Gatherings Directive applies uniformly to a type of activity—namely, gathering—not a type of facility. *See* Gatherings Directive at 3 ("This Directive does not regulate whether a facility is open or closed."). The Capacity

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[5] Applicants assert without elaboration that "County officials have monitored, harassed, sued, and fined houses of worship." Application at 8. This description is inaccurate. The County has an expansive enforcement program that has taken administrative enforcement action and issued fines against hundreds of businesses in Santa Clara County, nearly all of which are secular, such as retail businesses, restaurants, personal care businesses, and gyms. The County has one pending civil enforcement lawsuit against a church, Calvary Chapel San José, brought only after the County engaged in extensive outreach and education in an effort to seek voluntary compliance and avoid litigation. The state court has *twice* held the church in contempt for violating multiple public health orders that go well beyond the prohibition on indoor gatherings at issue in this case, including not requiring staff or attendees to wear face coverings or practice social distancing, allowing indoor singing, and refusing to submit a COVID-19 protection protocol. By contrast, the vast majority of other religious institutions in Santa Clara County have complied with State and County public health orders.

Directive currently prohibits all indoor gatherings because those gatherings present a unique combination of risk factors that creates a particularly high risk of SARS-CoV-2 transmission, according to the wide consensus of epidemiology and infectious disease experts. *See* Cody Decl. ¶¶ 11–12, 14, 34–41, 54; Lipsitch Decl. ¶¶ 38–42. Contrary to Applicants' argument, the County's prohibition on indoor gatherings is not limited to particular facilities—it prohibits indoor gatherings *anywhere* in the County, including at airports and retail establishments.

The Gatherings Directive defines a "gathering" as "[a]n event, assembly, meeting or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion." Gatherings Directive at 2. This definition is neutral toward religion. Applicants contend otherwise because the Capacity and Gatherings Directives include "explicit reference" to worship services. Application at 12–13. But merely listing worship services as one of many illustrative examples of similar activities covered by the directives does not evidence discriminatory treatment or mean that the directives fall below the "minimum requirement of neutrality." *Cuomo*, 141 S. Ct. at 66 (quoting *Lukumi*, 508 U.S. at 533). Rather, "the inclusion of worship services in a non-exclusive list of both religious and secular activities demonstrates that all similar activities are treated the same under the law." Jan. 29 Order at 27. And far from singling out religious activities, the examples the County provides in its Capacity and Gatherings Directives confirm that the restrictions are neutral, applying broadly to secular and religious activities alike.

Indeed, the complete list of examples—"wedding, banquet, conference, religious service, festival, fair, party, performance, competition, movie theater operation, fitness class, barbecue, protest, or picnic," Gatherings Directive at 2, and "political events, weddings, funerals, worship services, movie showings, [and] cardroom operations," Capacity Directive at 2—is predominantly secular.

Moreover, the County's directives have a practical purpose: members of the public must be able to read them and understand what conduct is and is not permitted at this time. The illustrative examples serve to clarify the restrictions.

Applicants also contend that even beyond the text, the directives necessarily single out places of worship because "[i]t requires little explanation that places of worship sit as the venue for worship services."[6] Application at 14. But Applicants ignore that the County prohibits *all* indoor gatherings, regardless of where they occur and regardless of purpose. Thus, the Capacity Directive's limitations apply uniformly to *any* gathering that meets the Gatherings Directive's neutral definition, not to particular facilities. Just as movie theaters could open their doors to sell food from snack bars for take-away consumption, but cannot host hundreds of people for movie showings, churches, synagogues, temples, or mosques could open (and indeed, have opened) their doors for people to light candles, pray, and seek counsel from a

[6] Applicants conflate the temporary indoor gatherings prohibition with closure of places of worship, demonstrating a cramped understanding of the variety and significance of religious practice across faith communities. Many extremely important expressions of faith do not involve gatherings.

priest, pastor, rabbi, imam, or other religious leader, but cannot host hundreds of people for indoor worship services or other gatherings.

Applicants also ignore the fundamental differences between the County's rules and California's, asserting that they present "nearly identical legal premises" and suggesting that because strict scrutiny applies to California's rules, it must apply to the County's as well. *Id.* at 10. California does not have a similar "gatherings" category that includes both secular and non-secular gatherings. Rather, as Justice Gorsuch emphasized in *South Bay II*, the "State's spreadsheet summarizing its pandemic rules even assigns places of worship their own row." 141 S. Ct. at 717 (statement of Gorsuch, J.). Similarly, California maintains a separate set of detailed rules for places of worship and religious service providers.[7] Not so for the County.

These differences are dispositive. They are the reason *South Bay II* enjoined California's specific prohibition on indoor worship services, but *not* its generally applicable singing ban. *See South Bay II*, 141 S. Ct. 716 (Mem). Six Justices voted against enjoining California's indoor singing ban pending appeal in *South Bay*. Justice Barrett, joined by Justice Kavanaugh, wrote separately to explain why: "As the case comes to us, it remains unclear whether the singing ban applies across the board (and thus constitutes a neutral and generally applicable law) or else favors

[7] *See* Cal. Dep't of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* (July 29, 2020), https://files.covid19.ca.gov/pdf/guidance-places-of-worship--en.pdf.

certain sectors (and thus triggers more searching review)." *Id.* at 717 (Barrett, J., concurring). In other words, this Court recognized that if the State's singing ban "applies across the board," it is "neutral and generally applicable" and thus subject to rational basis review.

The County's rules regarding indoor gatherings—which apply uniformly and across the board, without reference to their purpose or the type of facility in which they occur—are akin to a uniform ban on indoor singing and likewise subject to rational basis review. In *South Bay I*, the Ninth Circuit applied rational basis review to the singing ban because it "applies to *all* indoor activities, sectors, and private gatherings," and there was no "record evidence demonstrating that this ban results in disparate treatment of religious gatherings." 985 F.3d at 1152. Similarly, the district court analogized the County's indoor gatherings restrictions to the State's singing ban when applying rational basis review to the Capacity Directive. Jan. 29 Order at 27–28 (citing *South Bay I*, 985 F.3d at 1152).

Moreover, although Justice Gorsuch, joined by Justices Thomas and Alito, would have enjoined the singing ban out of concern that the State is "playing favorites during a pandemic" by possibly granting the "powerful entertainment industry" an exemption from the indoor singing ban, *South Bay II*, 141 S. Ct. at 719 (statement of Gorsuch, J.), there is no such concern here. No powerful industry—indeed, no one at all—has obtained an exemption from the County's prohibition on indoor gatherings.

3. The County's Public Health Orders Are Not Underinclusive Because of the Rules Applicable to Airports

Applicants try to sidestep the clear implications of *South Bay I* and *II* by suggesting the County has been "playing favorites" by allowing the San José International Airport to operate. Application at 15–17. But the County has imposed the very same restrictions on the airport as it has on other indoor facilities. Moreover, airports present different issues and are subject to distinct and stringent restrictions that Applicants entirely ignore. Airports are governed by multiple, overlapping regulatory regimes that circumscribe the County's authority to regulate airport activities. At the same time, the County has taken additional action, expressly allowed by the FAA, to address the relevant risks by imposing a mandatory 10-day quarantine on travelers entering Santa Clara County.

Applicants seize on a March 11, 2020 press release from the County's Public Health Department to assert that the County "exempted" airports from its definition of gatherings. *Id.* at 16–17. This argument has no merit. The press release—issued in the first few weeks of the pandemic before the County issued the nation's first shelter-in-place order and months before it issued the Gatherings and Capacity Directives—merely stated that the County was, at that time, "not currently recommending closure of the airport given the significant societal harms lack of access to travel would cause." *Id.* at 16 (quoting Press Release, County of Santa Clara Public Health Department: Statement Regarding COVID-19 and Airports (Mar. 11, 2020), https://www.sccgov.org/sites/phd/news/Pages/covid-19-airports.aspx).

To be clear, the County has *not* exempted airports from the Gathering Directive. Any gathering inside an airport (say, for example, a gathering to protest airport policies) would violate the County's restrictions on indoor gatherings. Applicants point to no County directive suggesting otherwise. And the County has also restricted airports—like all other governmental and non-governmental facilities open to the public—to 20% capacity. *See* Capacity Directive at 4. Thus, Applicants misstate the facts and mislead the Court when they assert that the County's directives are underinclusive because "airports operate at 100% capacity but indoor worship services are banned." Application at 13; *see also id.* (acknowledging that 20% capacity limitation applies to "all essential and critical infrastructure facilities and government facilities of any kind").

Importantly, however, airports are not a proper comparator in light of both the federally imposed limits on the County's authority in this arena and the additional quarantine restrictions the County has imposed on air passengers. For example, the FAA has issued guidance to address the "authority to implement a range of restrictions, changes in operations, terminal service consolidations, and other responses to the COVID-19 public health emergency." Respondents' Ex. 4, FAA Guidance at 1. FAA approval is required for the "temporary closure or restriction of federally obligated airports for non-aeronautical purpose," which includes COVID-19 public health measures, and the guidance emphasizes that "in general, the FAA does not permit" such changes. *Id.* at 2. Accordingly, the County likely does not have the authority to infringe upon activities necessary for travelers

to board and deplane their flights safely (even if such activity constituted a gathering, which it does not, *see infra* at 24–25).

Additionally, consistent with FAA guidance that public health requirements for screening and quarantining passengers are "likely to be acceptable," FAA Guidance at 3, the County's Mandatory Directive on Travel ("Travel Directive") applies unique restrictions to travelers. The Travel Directive requires persons entering Santa Clara County from more than 150 miles away to quarantine for at least 10 days after arrival.[8] Respondents' Ex. 5, Travel Directive ¶¶ 1–3. The County's treatment of airports and the passengers that travel through them and indoor worship gatherings cannot be compared without taking this restriction into account. Notably, although Applicants have requested an injunction imposing on them the same rules that apply to airports, they certainly do not appear to be proposing that their congregants quarantine for 10 days after every indoor worship gathering.

Finally, the district court correctly found that travelers transiting through and waiting in an airport do not fall within the County's definition of a "gathering." As the district court explained, "people in airports typically do not interact with members of other households, carry on social conversations, sit in one place for an hour or more, or engage in singing, chanting, or other activities that increase viral

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[8] Because all flights into the San José International Airport originate from greater than 150 miles, all travelers exiting the airport and remaining in Santa Clara County are subject to the Travel Directive.

exposure." Jan. 29 Order at 20–21; *id.* at 27; Lipsitch Decl. ¶ 39. Accordingly, general transit through the airport is not an indoor gathering, and does not carry the same risk profile as an indoor gathering.

In sum, the County's prohibition on indoor gatherings is neutral, generally applicable, and tethered to the scientific evidence of the relative risk of activities. Because the across-the-board prohibition does not play favorites or "single out houses of worship for especially harsh treatment," *Cuomo*, 141 S. Ct. at 66, the County's rules do not trigger strict scrutiny. And there can be no question that the County's prohibition on indoor gatherings is "rationally related to legitimate government interests" in stemming the spread of COVID-19, because the County has, *inter alia*, an "'unqualified interest in the preservation of human life.'" *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (quoting *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 282 (1990)). Applicants do not contend otherwise.

B. Even if Strict Scrutiny Applies, the County's Directives Are Narrowly Tailored to Stem the Spread of COVID-19

Although strict scrutiny should not apply, the result would be the same if it did. Under that standard, the County's prohibition "must be 'narrowly tailored' to serve a 'compelling' state interest." *Cuomo*, 141 S. Ct. at 67 (quoting *Lukumi*, 508 U.S. at 546). As Applicants concede, the County "unquestionably" has a compelling interest in "[s]temming the spread of COVID-19." *Id.*; Application at 11.

The County's challenged directives combat the spread of COVID-19 by restricting the activities that public health experts agree pose the highest risks of

transmission. This activity-specific and risk-based approach is inherently more tailored than a facility- or sector-based approach. The County's face covering and social distancing requirements reduce but do not eliminate the risk of transmission associated with certain high-risk activities. Cody Decl. ¶¶ 11–12, 14, 38, 61; Lipsitch Decl. ¶ 45. The County therefore has imposed additional restrictions on those activities that are proportionate to their risk. For instance, public health experts agree that bringing together large groups of people indoors where they gather, speak, and socially interact for an extended period of time is an extremely high-risk activity. Cody Decl. ¶¶ 11–12, 14, 34–41, 48, 54; Lipsitch Decl. ¶¶ 38–45. This is why indoor gatherings are currently prohibited. And because gathering outdoors significantly lowers the risk of transmission, Cody Decl. ¶¶ 34–36, 54, 56, 60; Lipsitch Decl. ¶¶ 38, 40, individuals may gather outdoors in large numbers subject to more lenient restrictions, Capacity Directive at 2; Gatherings Directive at 1–2, ¶¶ 4–5.

These activity-specific risk assessments are further calibrated based on the prevalence of COVID-19 in the community. *See* Cody Decl. ¶¶ 91–92. When seven-day average case counts were below 5 per 100,000, and positivity rates below 5%, as they were for much of October and November 2020, the County permitted all indoor gatherings, including worship gatherings. *Id.* ¶ 60. But when cases started rising exponentially in mid-November, the County prohibited all indoor gatherings once more. *Id.* ¶ 69. Now, with case counts and positivity rates returning to manageable levels again, the County anticipates allowing indoor gatherings in the next few

weeks. In other words, the County does not plan to maintain the prohibition on indoor gathering any longer than the data demonstrates it is necessary. This is precisely the kind of "dynamic" local public health action responding to "changing facts on the ground" "in areas fraught with medical and scientific uncertainties" that one member of this this Court has warned against disturbing. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

Applicants offer but one reason why the County's prohibition on indoor gatherings is not narrowly tailored: it is underinclusive because it allegedly allows "gatherings at [airport] gates and other business activities." Application at 18. In so arguing, Appellants once again conflate transitory business operations with gatherings. Just as customers at a grocery store do not "gather" simply because they happen to be in the same check-out line at the same time, travelers waiting to board a plane in an airport terminal do not "gather" simply because they come near one another incidentally while they wait. In both scenarios, customers and travelers are engaged in independent, asocial activities, rarely seek to interact with each other, and avoid remaining in the same place for an hour or more. For this reason, the transitory flow of people through airports reflects a different risk profile than gatherings. *See* Jan. 29 Order at 20–21.

And critically, as noted, the County has imposed additional restrictions it has the authority to apply at a multi-jurisdictional facility. If boarding and deplaning a flight did constitute a gathering (and they do not), the FAA likely would not allow

the County to infringe upon those activities. To the extent of its authority, however, the County has imposed the same capacity and gathering restrictions on airports as other facilities, as well as a unique requirement on travelers entering Santa Clara County that is expressly permitted by the FAA and applicable to no other activity—a mandatory 10-day quarantine.

In sum, the County's proportional, dynamic, and focused response to the COVID-19 pandemic does what narrow tailoring requires: tethers the restrictions imposed to the circumstances and the level of risk each activity poses.

II. Equitable Considerations Also Weigh Against Enjoining the County's Prohibition on Indoor Gatherings

The balance of equities and public interest overwhelmingly favor allowing the County to continue enforcing its prohibition on indoor gatherings to protect its residents. Applicants do not attempt to balance the interests at stake. The County does not dispute that Applicants have an important interest in group worship indoors. But Applicants' one-sided argument ignores that they have safer alternatives to indoor gatherings, including outdoor, car-based, and live-streamed gatherings—alternatives that diverse religious institutions in Santa Clara County have successfully utilized throughout the pandemic.

Applicants also wholly ignore the serious public health interests on the other side of the equation. If this Court requires the County to create a special exemption

from its directives for religious gatherings,[9] the result will be thousands of people gathering indoors every weekend. As the record reflects, "there is strong evidence to conclude that such gatherings would introduce significant risk of transmission and lead to avoidable infections and death in the community." Jan. 29 Order at 29. Applicants present no evidence to the contrary. Even if Applicants do not grapple in any way with the life and death consequences at issue, this Court must.

The evidence in the record overwhelmingly shows that indoor gatherings—whether for book clubs, concerts, conferences, movies, lectures, sales demonstrations, group worship, trade shows, or any other purpose—pose a particularly high risk of avoidable transmission, infection, and death from COVID-19. *See* Cody Decl. ¶¶ 11–12, 14, 34–41, 54–55. Applicants dismiss these risks by arguing that the public interest favors injunctive relief because there is "no proof . . . that attendance at the applicant Churches spreads COVID 19." Application at 21. But the district court rejected this argument as neither "reliable" nor "compelling" "[b]ecause of the reality that the virus may transmit through asymptomatic individuals." Jan. 29 Order at 22; Cody Decl. ¶ 64. What is more, Applicants' unsupported assertion is undermined by the numerous reports of indoor gatherings throughout the course of the pandemic that have led to outbreaks and

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[9] It is also not clear under this Court's First Amendment jurisprudence that the County would be able to limit such an exception to religious gatherings because many activities are protected by the First Amendment.

superspreader events, often resulting in the infection and deaths of persons who did not even attend the gathering. Cody Decl. ¶ 41.

While the benefits of indoor gatherings will accrue only to Applicants, the risk and imminent life-or-death harm of those gatherings will be inflicted on the entire community. A COVID-19 outbreak that follows one of Applicants' indoor gatherings is unlikely to end there. Applicants and their congregants may be willing to risk infection to attend services indoors, but doing so also risks the health and lives of the rest of the community that did not choose to undertake that risk. It is the health and safety of *these* people—who do not attend indoor gatherings, who have underlying health conditions, who are elderly, who lack health coverage—who should be at the forefront of the equities analysis. Indeed, as the Ninth Circuit recognized,

> [E]ven if an individual congregant is willing to accept the risk of contracting the virus by partaking in such conduct, the risk is not an individual's risk to take. The risk is also to the lives of others with whom an asymptomatic person may come into close contact, to the healthcare workers who must care for the person one infects, and to [the] overwhelmed healthcare system as a whole.

South Bay I, 985 F.3d at 1148.

Applicants' only acknowledgement of the potential harm to Santa Clara County and its residents is to minimize it. They hypothesize that "[t]he County would not need to be exposed to meaningful harm as a result of injunctive relief" because Applicants "are prepared to follow all reasonable safety precautions equal to those imposed on others," including airports. Application at 21. This argument ignores that the County already imposes the same 20% capacity limitation on places

of worship as it imposes on airports, grocery and retail stores, and other facilities open to the public. It overlooks the critical differences in transmission risk associated with gathering and non-gathering activities. It flouts the record evidence that the "reasonable safety precautions" Applicants have represented they are willing to follow are still insufficient to protect attendees at indoor gatherings and the community at large when transmission rates remain high. *See* Jan. 29 Order at 22; Cody Decl. ¶¶ 11–12, 14, 38, 61; Lipsitch Decl. ¶ 45. Finally, it ignores that the County requires a mandatory 10-day quarantine on travelers at the airport, a safety restriction Applicants do not suggest they would be willing to adopt for their indoor gatherings. *See* Travel Directive ¶¶ 1–3.

As it has throughout the pandemic, the County continually evaluates the most recent data on case counts, hospital ICU capacity, and fatalities from COVID-19 as well as the scientific evidence regarding methods of transmission to determine when certain restrictions can be relaxed, modified, or lifted. *See* Cody ¶¶ 90–92. Based on current data, the time has not yet come to lift the prohibition on indoor gatherings, though with vigilance, common sacrifice by all members of the community, and the arrival of vaccines, the County expects it will come very soon.

CONCLUSION

The County respectfully asks this Court to deny Applicants' emergency application for a writ of injunction or, in the alternative, certiorari before judgment or summary reversal.

Dated: February 24, 2021

Respectfully submitted,

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