

No. 20-55445

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WENDY GISH, *et al.*,
Plaintiffs and Appellants,

v.

GAVIN NEWSOM,
In his official capacity as Governor of California, *et al.*,
Defendants and Appellees.

On Appeal from the Order of the United States District Court for the
Central District of California The Honorable Jesus G. Bernal
District Court Case Number: 5:20-00755-JGB-KK

**AMICUS CURIAE BRIEF OF THE FREEDOM FROM RELIGION
FOUNDATION IN SUPPORT OF APPELLEES**

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INTEREST OF AMICUS CURIAE¹

The Freedom From Religion Foundation is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. FFRF is a nonprofit organization with more than 33,000 members nationally, including more than 4,000 members in California. FFRF has over 200 members in Riverside County and over 100 members in San Bernardino County. FFRF also has a regional chapter in California, the Greater Sacramento Chapter of FFRF. Any preferential exceptions to public health orders that would apply to churches would subject FFRF's members to further community spread of COVID-19 and violate their constitutional rights.

FFRF's purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state/church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. Consequently, FFRF has a direct interest in ensuring proper application of the religion clauses of the First Amendment.

¹ No counsel for any party has authored this brief, in whole or in part. No monetary contribution has been made to the preparation or submission of this brief other than by the amicus curiae, its members or its counsel.

SUMMARY OF ARGUMENT

This appeal is moot. The original public health orders Plaintiffs challenged have all been rescinded or superseded by significantly different orders.² However, even if the matter were not moot, Plaintiffs failed to advance a viable argument for enjoining an order that prevents the spread of a lethal contagion for two basic reasons.

First, the stay-at-home order does not disfavor religious gatherings; it applies the same attendance rules to churches as it does to other, similar mass gatherings that are not religious. Both of California's statewide public health orders regulate conduct, rather than religious status, to ensure fair application that comports with religious freedom interests. If anything, the current order actually *favors* churches because it allows churches to gather now, but similarly situated secular gatherings (such as concerts and sporting events) are not permitted until later phases of the re-opening.

Second, the relief Plaintiffs seek—to enjoin stay-at-home orders as they apply to religious gatherings—is unavailable and would itself conflict with the First Amendment if issued.

² The Governor's initial public order was Exec. Order No. N-33-20. This order was superseded by Exec. Order N-60-20.

ARGUMENT

California and Riverside and San Bernardino counties issued stay-at-home orders that restrict community gatherings in order to combat the ongoing COVID-19 pandemic. Plaintiffs originally sought a preliminary injunction against these three orders.³ The two challenged county orders have since been rescinded and the statewide order has been superseded by a new order that differs significantly from the original. The orders Plaintiffs challenged no longer exist. The appeal concerning the denial of an injunction against these nonexistent orders is therefore moot.

Plaintiffs attempt to challenge the new state order using the same religious freedom arguments. This brief will show that the underlying arguments are entirely meritless at this or any other stage of litigation.

I. Plaintiffs are not subject to unequal treatment under any order

California's public health orders do not discriminate against houses of worship. If anything, the orders treat the Plaintiffs more favorably than similarly situated secular organizations.

³ Plaintiffs requested a temporary restraining order (TRO) in the district court, but are now asking this court to treat the appeal as an appeal of the denial of a preliminary injunction.

The “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Here, the government has maintained that neutrality by treating churches like other, similarly situated gatherings. The disconnect arises because Plaintiffs—perhaps affronted at not receiving the “essential” label—mistake which gatherings are similar to worship services.

At the District Court, Plaintiffs claimed that the original state and county public health orders were not generally applicable, but instead targeted religion for negative treatment. This would raise problems under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). However, this argument was based on the orders’ small exemptions for “essential activities.” Plaintiffs believed that their church worship services were as essential as “food, prescriptions, and health care.”⁴ Plaintiffs were not complaining that they were targeted for *negative* treatment, they were complaining that they received *equal* treatment. In short, the order treated Plaintiffs equally when they were demanding favoritism.⁵

⁴ Governor's Exec. Order No. N-33-20 (Mar. 19, 2020).

⁵ Plaintiffs have not addressed this same argument in their appellate brief and appear to have waived the argument for purposes of this appeal. *See Ridgeway v. Walmart, Inc.*, 946 F.3d 1066, 1076 (9th Cir. 2020) (“When an appellant fails to clearly and distinctly raise an argument in its opening brief, this court considers the argument abandoned.”).

The Supreme Court already disposed of this argument: California’s new order addresses religion because it treats gatherings for worship services differently from other activities, such as visiting grocery stores. *South Bay United Pentecostal v. Newsom*, 140 S. Ct. 1613 (2020). Gathering for extended periods to watch a movie or a sporting event or lecture or worship service is not comparable to shopping for groceries. There are many dissimilarities, including duration, movement, contact, and necessity. The activities are simply not the same. As Chief Justice Roberts explained a few weeks ago:

“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.”

South Bay United Pentecostal, 140 S. Ct. 1613, 1613 (2020) (C.J. Roberts, concurring).

None of California’s public health orders target any activity or organization for unfavorable treatment for having a religious character. Initial restrictions on gatherings applied not only to churches, but to movie theaters, concert halls, and other secular locations. Since the start of the pandemic, essential medical care has

been provided across California not just by secular hospitals, but also by religiously-affiliated hospitals with religious missions. The orders make no distinction between them. Similarly, food service workers⁶ are subject to the same regulations whether they work at In-N-Out, whose owner expresses her faith by adorning the company's food with Bible passages, or Fatburger, which serves burgers sans scripture.⁷

The new arguments Plaintiffs raise on appeal to challenge the new statewide order also rest on a simple factual mistake. Plaintiffs assert that certain restrictions, such as a rule limiting worship service attendance to the lesser of 25% capacity or 100 people, target religion and do not apply to similar secular gatherings. This is simply wrong. In fact, to the extent that other similar mass gatherings, like movie screenings, are permitted, the exact same rule applies—25% or 100 people.⁸

If anything, California's response to the pandemic is not neutral because the state unconstitutionally *favors* religion. “[T]he Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious

⁶ Plaintiffs contemptuously labeled these hard-working citizens as “burger flippers” when asking the district court for a Temporary Restraining Order.

⁷ Brett Molinda, *In-N-Out owner explains why fast-food chain prints Bible verses on food*, USA Today (Oct. 18, 2019) www.usatoday.com/story/money/2019/10/08/in-n-out-owner-lynsi-snyder-interview-bible-verses/3906363002/.

⁸ COVID-19 Industry Guidance: Family Entertainment Centers <https://covid19.ca.gov/pdf/guidance-family-entertainment.pdf>.

beliefs or of religion generally.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989). Plaintiffs claim that worship services are the only mass gatherings that are subject to a 25% capacity or 100-person limit.⁹ This was true at the time only because comparable secular mass gatherings, such as movie screenings and concerts, were banned completely. In other words, California favored religious activity over similar secular activity because large indoor religious gatherings were allowed to take place, but large indoor secular gatherings were banned. Since Plaintiffs initially filed their brief, California has allowed movie theaters to reopen subject to the same 25% capacity or 100-person limitation that applies to religious gatherings.¹⁰ Other secular mass gatherings, such as concerts and sporting events with an audience, remain banned.¹¹

California’s public health orders do not target religious activity for unfavorable treatment. Parity is not persecution and equality is not discrimination. Whatever religious freedom argument the Plaintiffs are attempting to make, it must fail because they are treated equally.

⁹ Appellant Br. 8.

¹⁰ COVID-19 Industry Guidance: Family Entertainment Centers <https://covid19.ca.gov/pdf/guidance-family-entertainment.pdf>.

¹¹ Resilience Roadmap, <https://covid19.ca.gov/roadmap/#stage-3>. See also Statewide industry guidance to reduce risk <https://covid19.ca.gov/industry-guidance/>.

II. Plaintiffs cite past unconstitutional government favoritism to argue for further unconstitutional government favoritism, but two wrongs do not make a right.

Plaintiffs argued, correctly, that one aspect of the orders violated the Establishment Clause, but they seek injunctive relief that is unavailable as a matter of law.

The Supreme Court has reiterated the neutrality rule stated above—that the Establishment Clause of the “First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion”—many times. *McCreary Cty., Ky.* 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson v. Ark.*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947).

Plaintiffs focus on the first part of this rule and ignore the latter part of that rule, which is just as crucial: the First Amendment bars the government from preferring one religion over another, **but also religion over non-religion.** *Everson*, 330 U.S. at 8 (the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27–28 (1997) (“government may not favor religious belief over disbelief”) (Blackmun, J., concurring).

Plaintiffs correctly identify an Establishment Clause concern in their initial complaint. 2 ER 000056. The Riverside County order contained “several

exceptions ... including certain religious activities during Easter, a day significant to Christians, without exempting those same activities when occurring on days both before and after Easter, or on days significant to other faiths.” *Id.*

FFRF agrees that it is inappropriate for any government to carve out exemptions to stay-at-home orders for particular holy days that are important and specific to one religion. COVID-19 does not recognize or rest on holidays and in-person religious gatherings have sparked massive outbreaks across the globe, the United States, and California.¹² However, Plaintiffs’ conclusion—that if the government already created a special exemption for one religious gathering, it must create a special exemption for all of Plaintiffs’ proposed religious gatherings to avoid an Establishment Clause violation—is incorrect.

The Supreme Court has directly addressed the issue of what the proper remedy ought to be when a court finds a “discriminatory exception [that] consists of favorable treatment for a discrete group.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017). Under *Sessions*, when deciding if the favorable yet “discriminatory exception” should be extended to all or eliminated altogether, the court must (1) evaluate the “intensity of commitment to the ... main rule, not the exception” and (2) “consider the degree of potential disruption ... that would occur

¹² Stephanie Lin, *Dozens of COVID-19 cases linked to Sacramento Co. church*, KCRA 3 (April 2, 2020) <https://www.kcra.com/article/dozens-of-covid-19-cases-linked-to-sacramento-county-church/32025605>.

by extension as opposed to abrogation” *Id.* Here, both considerations reinforce eliminating favorable treatment for Christian churches and applying the regulations on indoor gatherings equally. The state is committed to regulating gatherings to limit the spread of COVID-19 as evidenced by this litigation and a strong, repeatedly publicized desire to save lives. The purpose of the original orders was to reduce the spread of COVID-19 by preventing large gatherings that allow a single infected individual to spread the virus to many people at once. Enjoining orders that prohibit high-risk indoor gatherings, including religious gatherings, would disrupt this goal. Consistent application of the mass gathering rules enhances the goals and ensures equal treatment for all.

Even if the *Sessions* factors cut the other way, the remedy is unavailable because expanding the orders’ religious exemptions would violate the Establishment Clause twice over. First, attempting to decide which holidays are worthy of exception would entangle the government in religious questions. Second, the remedy would favor religion over nonreligion.

Expanding religious exceptions poses grave entanglement concerns. As the Supreme Court has stated, “[t]here exists an overriding interest in keeping the government ... out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk

the Establishment Clause was designed to preclude.” *Texas Monthly* 489 U.S. at 20. (quoting *US v. Lee* 455 U.S. 252, 257-58 (1982)). Expanding the religious exemptions to California’s public health orders would force government officials to make decisions about which religious gatherings qualify for the exemptions and why. The only plausible means for doing so that does not entangle the government in religious doctrine is based on the number of people attending the gathering. And that is precisely what the order currently regulates.

Finally, the relief would single out religion for favorable treatment and grant it a license to risk the lives of every Californian. The Supreme Court in *Texas Monthly* held that any benefit conferred to religious organizations must “be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups.” *Texas Monthly*, 489 U.S. at 15 (striking down a tax exemption for religious, but not secular publishers). In the same ruling, the Supreme Court rejected an argument that the tax exemption at issue was constitutional because the state provided other tax exemptions that served other purposes. *Id.* Likewise, Plaintiffs in this case cannot use the less stringent regulations that apply to grocery stores and hospitals, which serve a secular purpose, to justify exempting “faith based or religious” activities from restrictions that apply to other gatherings, which would not serve a secular purpose.

III. Every public interest, government interest, and equitable consideration weighs heavily against any exemption from public health orders. Lives depend on it.

Plaintiffs are arguing against public health orders that save lives and fight a deadly global pandemic. Public health orders are a long-standing and essential tool to fight such pandemics. At least 42 U.S. states have issued similar statewide orders.¹³ Around the world, governments and countries across the world have issued similar restrictions on gatherings.¹⁴ The reason is simple: restrictions on public gatherings save lives.¹⁵

Enjoining these orders, even if only for religious gatherings, will spread the virus and kill hundreds, thousands or perhaps tens of thousands of people. Reuters reported: “South Korea announced thousands of coronavirus cases in the space of only a few days in late February. The surge in cases centered mostly around one main cluster from a church in Daegu city.”¹⁶ That article documents the harrowing

¹³ Sarah Mervosh, Denise Lu, and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, New York Times (April 20, 2020) <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

¹⁴ Christina Boyle, *Stay-home order brings Britain in line with European neighbors*, Los Angeles Times (March 23, 2020) <https://www.latimes.com/world-nation/story/2020-03-23/britain-crackdown-social-distancing>.

¹⁵ Heather Cherone, *Stay-at-Home Order Saved Nearly 1,700 Lives in Chicago: City Data*, WTTW (April 15, 2020) <https://news.wttw.com/2020/04/15/stay-home-order-saved-nearly-1700-lives-chicago-city-data>.

¹⁶ “The Korean clusters: How coronavirus cases exploded in South Korean churches and hospitals,” Reuters (March 20, 2020)

story of **one infected person attending two church services and spreading COVID-19 to another 1,200 people, noting that that single “church cluster accounts for at least 60 percent of all cases in South Korea.”** COVID-19 cases have been linked to religious gatherings in more than ten states.¹⁷ These states include California’s neighbors, like Oregon, where over 230 cases in one town have been linked to a single church, and Arizona, where a church rally appears to have helped the virus spread throughout the Navajo Nation.¹⁸ California does not need to look beyond her borders to understand the unique danger posed by in-person worship gatherings during a pandemic. Sacramento County, Mendocino County, and Butte County have traced infection clusters back to religious gatherings, including church services that violated the State’s original public health

<https://graphics.reuters.com/CHINA-HEALTH-SOUTHKOREA-CLUSTERS/0100B5G33SB/index.html>.

¹⁷ For examples, see Associated Press, *Church linked to Oregon’s largest outbreak as daily coronavirus count hits record high*, Los Angeles Times, (June 17, 2020) <https://www.latimes.com/world-nation/story/2020-06-17/church-linked-oregon-largest-coronavirus-outbreak>; Eric Grossarth, *Idaho Falls church revival leads to 30 confirmed or probable cases of coronavirus*, Idaho Statesman (June 4, 2020) <https://www.idahostatesman.com/news/coronavirus/article243274446.html>; and *Coronavirus Outbreak Linked To West Virginia Church Grows To Over 40 Cases*, CBS News Pittsburg <https://pittsburgh.cbslocal.com/2020/06/22/graystone-baptist-church-case-count-grows/>.

¹⁸ Trudy Balcom, *COVID-19 outbreak on the Navajo Nation linked to church rally*, White Mountain Independent (March 24, 2020) https://www.wmicentral.com/covid-19/covid-19-outbreak-on-the-navajo-nation-linked-to-church-rally/article_6d01d461-5b8c-53eb-a962-b16fca36c2bd.html.

order.¹⁹ For this reason, Justice Roberts observed that California’s orders “should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” *South Bay United Pentecostal*, 140 S. Ct. 1613, 1614 (2020) (internal quotations omitted).

Churches asking for religious exemptions to public health orders are not simply asking for a right to gather, they are also asking for a right to risk the health and lives of every other member of the community and country. They are risking the lives of responsible community members, immuno-compromised people, and other individuals who are, for instance, only risking exposure to get necessary groceries or medicine. The District Court recognized that “the risk of transmission increases with every out-of-home contact.” ER 000008. The new rise in COVID-19 cases in California only exacerbates that risk.²⁰

Granting the requested injunction would almost certainly result in more death. There would be many other negative outcomes. The long-term effects of COVID-19 on survivors are unknown, but appear serious and potentially include

¹⁹ Alex Wigglesworth, *More COVID-19 cases linked to California Church Services*, LA Times (May 24, 2020) <https://www.latimes.com/california/story/2020-05-24/more-coronavirus-cases-linked-to-california-church-services>.

²⁰ KCRA Staff *California again sees largest one-day increase in COVID-19 cases*, KCRA 3 (June 24, 2020) <https://www.kcra.com/article/gov-newsom-coronavirus-update-june-24/32958634>.

liver, kidney, and cardiovascular damage. These devastating, if not life-threatening, effects are severe and common enough that some hospitals could not keep up with the increased demand for kidney dialysis related to the virus.²¹ Any injunction against these orders will extend the duration of the pandemic, which will impact even the uninfected because Californians are avoiding necessary care for medical issues unrelated to COVID-19.²²

Lessening the effectiveness of the public health orders during this process will force the state to keep the restrictions in place longer, burdening the rights of all Californians. Even if the restrictions were not extended to counter their reduced effectiveness, the prolonged increase in cases could result in a longer period of time where Californians are simply unwilling to gather due to the safety risk.

²¹ Lenny Bernstein, et al., *Coronavirus Destroys lungs. But doctors are finding its damage in kidneys, hearts and elsewhere*, Washington Post (April 15, 2020) https://www.washingtonpost.com/health/coronavirus-destroys-lungs-but-doctors-are-finding-its-damage-in-kidneys-hearts-and-elsewhere/2020/04/14/7ff71ee0-7db1-11ea-a3ee-13e1ae0a3571_story.html. See also, Mandeep R. Mehra et al., *Review Article: COVID-19 and Liver Disease-What We Know on 1st May 2020*, National Library of Medicine (May 13, 2020) <https://www.nejm.org/doi/full/10.1056/NEJMoa2007621>.

²² Elizabeth Lawrence, *Nearly Half Of Americans Delayed Medical Care Due To Pandemic*, KHN (May 27, 2020) <https://khn.org/news/nearly-half-of-americans-delayed-medical-care-due-to-pandemic/>.

CONCLUSION

All 40 million Californians are shouldering the same burden. The religious nature of worship gatherings does not entitle Plaintiffs to special treatment. It certainly does not give them the right to risk others' health and safety, or, as the Supreme Court put it, "[t]he 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. Mass.*, 321 U.S. 158, 166–67 (1944). *See also*, *Whitlow v. California*, 203 F. Supp. 3d 1079, 1086 (S.D. Cal. 2016) ("[T]he right to free exercise does not outweigh the State's interest in public health and safety."). *See also*, *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905).

Plaintiffs' claims are without merit. The public interest and the Constitution weigh against enjoining these crucial, life-saving measures. This Court should leave the district court's ruling in place.

Respectfully submitted this 30th day of June, 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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