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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CALVARY CHAPEL SAN JOSE, a California Non-Profit Corporation, et al., Plaintiffs, **v.** **GAVIN NEWSOM, in his official capacity as the Governor of California, et al.,** Defendants.	5:20-cv-03794-BLF **STATE DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES** Date: March 10, 2022 Time: 9:00 a.m. Dept: 3 Judge: The Honorable Beth Labson Freeman

TO THE COURT AND PLAINTIFFS CALVARY CHAPEL SAN JOSE, et al.:

PLEASE TAKE NOTICE that on March 10, 2022, at 9:00 a.m., at the United States District Court, Northern District of California, Robert F. Peckham Federal Building & United States Courthouse, 280 South 1st Street, San Jose, CA 95113, Courtroom 3, Defendants Gavin Newsom and Public Health Officer Dr. Tomás Aragón will and hereby do move to dismiss this

action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that the Court lacks subject matter jurisdiction and for failure to state a claim upon which relief can be granted.[1]

This Motion is based on this Notice of Motion and Motion to Dismiss; the accompanying Memorandum of Points and Authorities and Declaration of Todd Grabarsky; all pleadings and papers on file in this action; and such other matters as the Court may deem appropriate.

Dated: October 15, 2021

Respectfully submitted,

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[1] Concurrent with this motion to dismiss, the State Defendants have filed an ex parte application to stay discovery pending resolution of the motion to dismiss. The State Defendants noticed the hearing on the motion to dismiss for the first available date, March 10, 2022. So as to expedite resolution of the motion to dismiss—and, thus, the ex parte application to stay discovery—the State Defendants would be amenable to briefing and hearing the motion to dismiss on an expedited schedule, at the Court's convenience.

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INTRODUCTION

Plaintiffs challenge California's defunct COVID-19 restrictions on indoor worship services. Their claims against the State are moot because the restrictions were rescinded several months ago, and there is no reasonable prospect that the State will reimpose them. Scientific advancements, most importantly vaccines, have made the State's previous strategies, including capacity restrictions on indoor gatherings such as worship services, outmoded and unnecessary. Indeed, even during the recent wave of infections caused by the novel coronavirus's Delta variant, the State imposed no new capacity or singing restrictions on houses of worship or, for that matter, any other sector. In any event, four separate federal and state court permanent injunctions *prohibit* the State from reimposing the restrictions at issue here. And, as Plaintiffs' perfunctory prayer for "nominal damages" is barred by the Eleventh Amendment, there is nothing left to adjudicate. Accordingly, the Court should dismiss the Third Amended Complaint as to the State Defendants.

BACKGROUND

Plaintiffs brought this lawsuit to challenge the State's COVID-related restrictions on in-person worship services. As the Court is well acquainted with this lawsuit, *e.g.*, ECF Nos. 67, 115; *see also S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1132-39 (9th Cir. 2021), what follows is a background summary relevant to the present motion to dismiss.

I. THE ELIMINATION OF ALL COVID-19 RESTRICTIONS ON WORSHIP SERVICES AND STATEWIDE PERMANENT INJUNCTIONS BARRING CALIFORNIA FROM REIMPOSING THEM

In response to improving conditions and the Supreme Court's ruling in *Tandon v. Newsom,* 141 S. Ct. 1294 (2021), the State lifted all mandatory attendance and singing restrictions on indoor worship services in April 2021. Decl. of Todd Grabarsky ISO Mot. to Dismiss Exs. 6-7. Since then, Plaintiffs and all other houses of worship have been able to conduct religious services free from any COVID-related capacity and vocalization restrictions.

On May 14, 2021, the court in *Harvest Rock Church v. Newsom*, C.D. Cal. No. 2:20-cv-06414-JGB, entered a stipulated, statewide permanent injunction that bars the State from re-

imposing any of the restrictions on attendance or singing that are at issue in this lawsuit, except under circumstances involving a severe and unusual upswing in cases and hospitalizations. Grabarsky Decl. Ex. 1. And even in that event, the State must treat religious worship the same as (or no worse than) other activities posing a similar risk of transmission, as identified by the Supreme Court in *Tandon* and other decisions. *Id.* The State subsequently entered into similar stipulated permanent injunctions in three other cases. *Id.* Exs. 2-4.

Meanwhile, starting in early April and throughout May, as vaccination rates rapidly increased, California began announcing and implementing a policy of relaxing and rescinding the State's COVID-19 regulatory framework. Grabarsky Decl. Ex. 5, 8-10. On June 11, Governor Newsom rescinded Executive Order (EO) N-33-20 (the original Stay-at-Home Order issued on March 19, 2020) and EO N-60-20 (the order issued on May 4, 2020, authorizing and directing the Public Health Officer to impose risk-based restrictions on various activities and sectors). Grabarsky Decl. Ex. 11. Thus, effective June 15, 2021, the Blueprint for a Safer Economy—which had been the State's COVID-19 regulatory framework since August 31, 2020—and all other previous restrictions have been totally removed.

Also on June 11, the State Public Health Officer issued an order expressly superseding its prior orders and the rules issued in connection with the original Stay-at-Home Order. *Id.* Exs. 12-13. In their place, the Public Health Officer required only that people follow the State's requirements concerning face coverings, guidance for large indoor events of over 5,000 attendees, and guidance for school and youth activities. *Id.*

II. PLAINTIFFS' THIRD AMENDED COMPLAINT

On September 30, Plaintiffs filed their Third Amended Complaint ("TAC"), ECF No. 116, in which they challenge the restrictions on attendance and singing during worship services that have been defunct for nearly six months. *E.g.*, TAC ¶¶ 64-67. Plaintiffs also challenge a previous iteration of the State's generally applicable face-covering requirement that was implemented on November 16, 2020. TAC ¶¶ 70-78 & Ex. 12. (The first iteration of the State's face-covering requirement was implemented on June 18, 2020. *See* Grabarsky Decl. Ex. 14.). The November face-covering guidance was rescinded on June 15, 2021. *Id.* Ex. 17; *see also id.*

Ex. 18. Although Plaintiffs had an opportunity to amend their complaint to challenge the currently operative guidance on face coverings (*id.* Exs. 17-18), they chose not to do so.

Plaintiffs now bring causes of action against the State Defendants under the U.S. Constitution First Amendment's Free Exercise, Free Speech, and Assembly Clauses, and the Fourteenth Amendment's Equal Protection Clause; the California Constitution's freedom of religion provision; and the Bane Act, Cal. Civil Code § 52.1.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. Although a complaint attacked by a motion to dismiss does not need "detailed factual allegations," it must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted).

Under Rule 12(b)(1), a party may move to dismiss a complaint for lack of subject-matter jurisdiction, and courts may consider certain materials outside the complaint without converting such a motion into a motion for summary judgment. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

ARGUMENT

I. PLAINTIFFS' CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT

A. The Rescission of the Restrictions at Issue and the Issuance of Statewide Injunctions Have Mooted Plaintiffs' Claims

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies," which means that "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) ("[I]f in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot.").

A change to or rescission of the challenged law or regulation "is usually enough to render a case moot," and thus deprive the court of jurisdiction, "even if the [government] possesses the

power to reenact the [law] after the lawsuit is dismissed." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (internal quotation marks omitted); *see also, e.g.*, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018); *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). Once a law has been replaced with a "new rule" that does not impose the challenged requirement, a case becomes moot. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020). Thus, as other courts have found, challenges to the State's COVID-related restrictions on worship services are moot. *County of Ventura v. Godspeak Calvary Chapel*, No. 56-2020-00544086-CU-MC-VTA (Ventura Cty. Sup. Ct. Aug. 6, 2021) (Grabarsky Decl. Ex. 20); *see also Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD (E.D. Cal. July 19, 2021) (Grabarsky Decl. Ex. 19) (staying discovery in a related matter after the State raised a serious challenge to the court's jurisdiction by way of mootness).

Here, there is no ongoing controversy or injury to redress because Plaintiffs are not subject to any of the restrictions they are challenging in the TAC and have not been for several months. As explained, on April 12, the State removed all remaining mandatory attendance limits on worship services, and on April 23, the State made its guidance on singing, chanting, and similar vocalizations during indoor worship services "recommended only." Grabarsky Decl. Exs. 6-7. And effective June 15, 2021, the State rescinded the various orders issued by the Governor and the Public Health Officer, including the Blueprint for a Safer Economy, on which those restrictions rested. *Id.* Exs. 8-13.

In addition, the State has entered into several statewide permanent injunctions that prohibit it from re-imposing the restrictions on attendance and singing challenged in the TAC. Grabarsky Decl. Exs. 1-4. Among other things, those injunctions prevent the State from imposing:

> (1) any capacity or numerical restrictions on religious worship services . . . ;
>
> (2) any new public health precautions on religious worship services and gatherings at places of worship not in the current guidance, unless those precautions are either identical to, or at least as favorable as, the precautions imposed on other similar gatherings of similar risk, . . . and;
>
> (3) any restrictions or prohibitions on the religious exercise of singing and chanting during religious worship services and gatherings at places of worship besides generally applicable restrictions or prohibitions included in the guidance for live

> events and performances[.]

E.g., id. Ex. 1, at 2. Thus, the State is enjoined from reimposing the very restrictions at issue in this case. Although the injunctions contain a proviso allowing some restrictions on worship services in the event of an extreme upswing in hospitalizations and case rates, *id.*, there is no danger of unconstitutional discrimination against religion because the State could only impose restrictions that are "either identical to, or at least as favorable as, the restrictions imposed on other similar gatherings of similar risk, as identified by the Supreme Court" in its recent decisions. *Id.*

Although Plaintiffs filed the TAC several months after those injunctions were entered, the TAC does not allege that the injunctions are inadequate in any respect; nor does it suggest that Plaintiffs need, or even want, any injunctive relief beyond what is already in place. Because there is nothing left to enjoin, the Court can no longer give Plaintiffs "any effective relief in the event that it decides the matter on the merits in [their] favor." *NASD Dispute Resolution, Inc. v. Judicial Council*, 486 F.3d 1065, 1068 (9th Cir. 2007).

Plaintiffs' challenge to the State's outdated November 2020 face-covering guidance likewise does not create a live controversy. *See* TAC ¶¶ 70-77 (describing challenge to the State's now-defunct face-covering requirement that was issued in November 2020). As explained, that guidance was superseded as of June 15, 2021, and Plaintiffs elected not to challenge the currently operative guidance, even though they had ample opportunity to do so. And in any event, the November 2020 guidance applied across-the-board to all indoor activities, not just indoor worship, so there is no conceivable Free Exercise problem or other constitutional concern. *See infra* Section III(A).

Finally, the fact that Plaintiffs are seeking declaratory relief as well as injunctive relief does not change matters. The mootness requirement is "not relaxed in the declaratory judgment context." *Gator.com v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc). As with injunctive relief, "the plaintiff must show that the policy has adversely affected and *continues to affect a present interest*." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017) (cleaned up) (emphasis added). And the Eleventh Amendment bars any *retroactive* declaration

concerning the State's former orders. *See Green v. Mansour*, 474 U.S. 64, 73 (1985).

B. The Voluntary Cessation Doctrine Does Not Apply

In April 2021, the Supreme Court held that a challenge to capacity restrictions on indoor in-home worship gatherings was not moot, even though those restrictions were about to expire within the week, because under the voluntary cessation doctrine "litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Tandon v. Newsom,* 141 S. Ct. 1294, 1297 (2021). That doctrine has no application here, however, because shortly after the Supreme Court ruled in *Tandon*, the State entered into four state and federal permanent injunctions that eliminate the State's ability to "reinstate the challenged restrictions." Simply put, the cessation of the challenged conduct is not "voluntary" at all; it is court-ordered and binding. The State cannot reinstate the enjoined restrictions without flagrantly and egregiously violating the injunctions and subjecting itself to contempt proceedings. That is why it is well-settled that "[r]elief from another tribunal may moot an action." *Sea-Land Services, Inc. v. ILWU*, 939 F.2d 866, 870 (9th Cir. 1991); *see also Kittel v. Thomas*, 620 F.3d 949 (9th Cir. 2010); *NASD Dispute Resolution*, 486 F.3d 1065; *Enrico's Inc. v. Rice*, 730 F.2d 1250 (9th Cir. 1984).

The voluntary cessation doctrine is aimed at gamesmanship—for example, where "a defendant [engages] in unlawful conduct, stop[s] when sued to have the case declared moot, then pick[s] up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013). But the existing court-ordered and binding injunctions leave no room for such gamesmanship because they definitively and permanently prohibit the State from reinstating the restrictions at issue here.

Accordingly, courts repeatedly have recognized that the voluntary cessation doctrine does not apply where, as here, the government is compelled by a judgment in another case to cease the challenged conduct. *See Sea-Land*, 939 F.2d at 870 ("[L]egally compelled cessation of such conduct is not 'voluntary' for purposes of this exception to the mootness doctrine."); *NASD Dispute Resolution*, 488 F.3d at 1068 ("We cannot give the appellants any further relief because

[two other cases] have already provided the relief sought by them in this case."); *Enrico's Inc.*, 730 F.2d at 1253, 1255 (dismissing appeal as moot following state court's injunction). And that remains true where, as here, the government stipulates to an injunction, judgment, or consent decree because they bind the government all the same. *See, e.g., J. Aron & Co. v. Miss. Shipping Co*., 361 U.S. 115 (1959); *San Francisco v. United States*, 130 F.3d 873, 883-84 (9th Cir. 1997).

Under the voluntary cessation doctrine, "*where the government is otherwise unconstrained*" from reenacting the challenged requirement, the mootness bar is higher. *Rosebrock*, 745 F.3d at 971 (internal quotations and citations omitted) (emphasis added); *see also Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021) (challenge to COVID guidance for K-12 schools not moot due to potential changes to the rules), *pet'n for reh'g en banc pending*.[2] But here, it is not the case that the State is "otherwise unconstrained," for its ability to reimpose the restrictions at issue is undoubtedly constrained—indeed *prohibited*—by four state and federal permanent injunctions.

C. Even If Applicable, the Voluntary Cessation Doctrine Would Not Defeat Mootness

Even if the voluntary cessation doctrine did apply, it still would not defeat mootness here. In cases against the *government*, a change in governing law or policy "presents a special circumstance in the world of mootness" whereby "unlike in the case of a private party, [courts] presume the government is acting in good faith." *Am. Cargo Transp. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). Thus, as the Ninth Circuit has held repeatedly, such a change by the government "should not be treated the same as voluntary cessation of challenged acts by a private party." *Glazing Health*, 941 F.3d at 1199; *Am. Cargo*, 625 F.3d at 1180 ("[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude ... than similar action by private parties."); *see also N.Y. State Rifle*, 140 S. Ct. at 1526 (declining to apply the more stringent "absolutely clear" standard); *Microsoft*, 138 S. Ct. 1186 (same). Accordingly, under the standard for *government* defendants, mootness caused by changes in the law can only be overcome with "evidence in the record" showing a "reasonable expectation" that the prior law

[2] *Brach* is distinguishable because, unlike K-12 schools, places of worship are subject to the aforementioned permanent injunctions barring reimposition of the restrictions at issue here.

or policy will be reimposed. *Glazing Health*, 941 F.3d at 1198-99 (describing the cases from "nearly all [other] circuits" that support this rule); *Am. Cargo*, 625 F.3d at 1180 (citing cases).

Nothing suggests that the State is likely to reverse course by reimposing restrictions on worship services in flagrant violation of four court-ordered permanent injunctions. On the contrary, the State's actions show just the opposite. As conditions began improving in the spring, the State announced it would relax and ultimately rescind the Blueprint and other restrictions in light of the rollout of its widespread vaccination program. The State followed through on that commitment, and in June 2021, it rescinded all the relevant orders issued by the Governor and the Public Health Officer. The State also stipulated to permanent injunctions in four cases that *prohibit* the reimposition of the rules challenged in this case. Most significant, even when the Delta variant caused a sharp uptick in cases, hospitalizations, and deaths in the summer and early fall—overwhelmingly among the unvaccinated—the State made no return to capacity restrictions or other non-pharmaceutical interventions that had previously been its primary tools in combating the pandemic. Instead, the State has shown by its actions that widespread vaccination is the path forward, and it has not wavered from that policy. All this means there is no "reasonable expectation" that the State will reimpose the challenged restrictions, even if four state and federal injunctions did not already bar it from doing so. *Glazing Health*, 941 F.3d at 1199.

Indeed, this case would be moot even under the more stringent standard for voluntary cessation cases involving non-governmental parties because "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). The State restricted attendance and singing at worship services for a specific purpose: to combat the spread of COVID-19 and prevent the State's healthcare system from being overwhelmed at a time when vaccines were not widely available (or available at all). *See, e.g.*, *South Bay*, 985 F.3d at 1132-36, 1141 n.21 (recognizing the grave threat posed by COVID-19 and finding no evidence that State's COVID restrictions were based on animus). These restrictions have now been eliminated because they are no longer needed, not because of litigation gamesmanship. *See County of Los Angeles v. Davis*, 440 U.S. 625 (1979) (challenge to recruitment procedure used to address "temporary emergency shortage of firefighters," and "only

because [the department] then had no alternative means of screening job applicants," was mooted by department's adoption of an "efficient and [materially different] method of screening job applicants"); *id*. at 633-634 (in absence of evidence of "animus that might have tainted other employment practices," claim was moot). And, even if the State wanted to, it could not reinstate those rules without violating four separate court orders.

A policy change this "broad in scope and unequivocal in tone" suffices to show mootness. *Am. Diabetes Ass'n v. U.S. Dep't of Army*, 938 F.3d 1147, 1152-1153 (9th Cir. 2019); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000). In *Rosebrock*, 745 F.3d at 972-974, the Ninth Circuit held that a single email sent by an administrator was sufficient to demonstrate a "policy change" that mooted the case. Here, the State formally rescinded the challenged restrictions last spring and has not reimposed them, even during the recent Delta variant surge. Thus, the State's policy change is sufficiently "entrenched" to moot the case, particularly given that it is permanently enjoined from reversing course by the four state and federal permanent injunctions. *See Am. Diabetes Ass'n*, 938 F.3d at 1153; *Rosebrock*, 745 F.3d at 947. When the Supreme Court spoke of "moving the goalposts," *Tandon*, 141 S. Ct. at 1297, it was addressing changes to restrictions that the State could still make *within* the Blueprint framework. But now that the Blueprint has been rescinded and the State is enjoined from reverting to restrictions on worship services, the "goalposts" have been torn down entirely.

II. THE ELEVENTH AMENDMENT BARS PLAINTIFFS' STATE LAW CLAIMS AND ANY CLAIM FOR DAMAGES OR OTHER MONETARY RELIEF.

The Eleventh Amendment bars Plaintiffs' request for "nominal damages" against the State Defendants, TAC pg. 27, who are sued in their official capacities only. *Holley v. CDCR*, 599 F.3d 1108, 1111 (9th Cir. 2010). Because there is no allegation in the TAC that the State's immunity has been abrogated or waived, *Dittman v. California*, 191 F.3d 1020, 1025-1026 (9th Cir. 1999), under any standard, any claim for damages must be dismissed. *Cf. Uzuegbunam*, 141 S. Ct. at 802 (request for nominal damages alone does not "guarantee[] entry to court"). Plaintiffs' claims under state law (claims 2 and 9) are also categorically barred by the Eleventh Amendment. *Pennhurst State School & Hosp. v. Halderman* 465 U.S. 89, 106, 124-125 (1984).

III. ALTERNATIVELY, PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR RELIEF

A. Plaintiffs Cannot Sustain a Free Exercise Claim Against the State's Defunct Restrictions on Singing or Face Coverings

Restrictions that incidentally burden religious activity are not discriminatory—and thus not subject to strict scrutiny under the Free Exercise Clause—unless *comparable* or *analogous* secular activity is treated less restrictively. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-32 533, 543, 546 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); *Stormans v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021) (declining to overturn *Smith*). A restriction will be deemed "underinclusive" only if it "fail[s] to prohibit nonreligious conduct that endangers [the State's interest] in a similar or greater degree than [the religious conduct] does." *Lukumi*, 508 U.S. at 543; *see also Fulton*, 141 S. Ct. at 1877 (defining "underinclusiveness" as a law that "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a *similar* way") (emphasis added). A restriction that is neutral and generally applicable, however, is subject to deferential rational basis review. *Lukumi*, 508 U.S. at 531-33, 543, 546; *Stormans*, 794 F.3d at 1079. Here, the defunct singing and face-covering rules challenged in the TAC are neutral and generally applicable. And because they are rationally related to a legitimate government interest, they are constitutional as a matter of law.

As one district court already found, it is clear "beyond a shadow of a doubt" that no other industry or sector (ever) received more favorable treatment than houses of worship with respect to restrictions on singing, including the entertainment industry. *Calvary Chapel of Ukiah v. Newsom*, __ F. Supp. 3d __, 2021 WL 916213, at *4-*8, *11-*12 (E.D. Cal. 2021). Plaintiffs do not and cannot allege that any other sector was treated more favorably than indoor worship; their allegations about singing in restaurants, day camps, childcare centers, schools, etc., *e.g.*, TAC ¶¶ 66, 73, 78, have already been rejected, and there is no reason for this Court to reach a different conclusion. *Ukiah*, 2021 WL 916213, at *4-*8, *11-*12.

Plaintiffs' challenge to the defunct face-covering guidance circa November 2020 fails to state a plausible claim for similar reasons. Those face-covering rules applied *across-the-board to*

all indoor businesses and activities; houses of worship were subject to the same rules and exemptions as all other indoor public spaces. Just like people eating in restaurants or getting a facial, for example, congregants at worship services were permitted to remove their masks to perform religious rituals such as taking of communion or drinking sacramental wine. *See* TAC Ex. 12 at p. 2 (exempting persons "who are actively eating or drinking" or "obtaining a service involving the nose or face"). And elderly or infirm congregants were also exempt. *See id.* ¶¶ 72, 91 & Ex. 12. The rules were neutral and generally applicable, and Plaintiffs do not and cannot plausibly allege that there was no rational basis for requiring face coverings in indoor venues. *See Young v. Becerra*, No. 3:20-CV-05628-JD, 2021 WL 1299069 (N.D. Cal. Apr. 7, 2021); *Forbes v. Cty. of San Diego*, No. 20-CV-00998-BAS-JLB, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021). To the contrary, their allegations are wholly conclusory and, as such, fail to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

More fundamentally, Plaintiffs fail to identify any harm *whatsoever* from the defunct November 2020 face-covering rules. Although they first sued the State Defendants in November 2020, they raised no complaint about the mask rules at that time. *See* First Am. Compl., ECF No. 38. It was not until they filed their Second Amended Complaint (ECF No. 81) on March 8, 2021, that they sought to challenge the mask requirements. By that time, they had been subject to the face-covering rules for *nine months*. In fact, Plaintiffs Southridge Baptist Church and Calvary Chapel San Jose admit that they "provide[] masks to congregants." ECF No. 38 ¶ 98; TAC ¶ 94. And even when given an opportunity to amend their pleading to challenge the *currently* operative face-covering rules, Plaintiffs declined to do so. The perfunctory nature of their allegations, their failure to challenge the rules that are currently in effect, and their long and unexplained delay in raising the issue after having been subject to that requirement for nine months belie any claim of harm. *Cf. Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984).[3]

[3] The *current* face-covering guidance, which Plaintiffs are not challenging, does not require vaccinated individuals to wear masks during indoor services, and, like previous iterations, (continued…)

B. Plaintiffs Fail to State a Cognizable Free Speech Claim

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). First Amendment rights to speech may be subject to reasonable time, place, or manner restrictions if those restrictions are "justified without reference to the content of the regulated speech[,] . . . narrowly tailored to serve a governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

All of the restrictions challenged in the TAC, including the former capacity restrictions on indoor worship, were permissible time, place, or manner restrictions. *See Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292, 1295 n.5 (9th Cir. 2015). Plaintiffs do not plausibly allege that any of the challenged restrictions were based on the content of protected speech, let alone anyone's viewpoint. *See Young*, 2021 WL 1299069 at *2 (dismissing free speech challenge to face-covering rules, holding that "nothing in the regulation . . . indicates that it is a content-based restriction"). Plaintiffs also do not and cannot allege that the State lacks an important—indeed, compelling—interest in slowing the spread of COVID-19. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). And finally, the rules were "narrowly tailored to serve a significant governmental interest, namely controlling a pandemic with a high illness and death toll." *Id.* at *2. The State sought to tailor its restrictions to the current state of knowledge concerning the virus, its spread, and the State's ability to treat persons infected with the disease. *See, e.g.*, *South Bay*, 985 F.3d 1128; *S. Bay United Pentecostal Church v. Newsom*, 508 F. Supp. 3d 756 (S.D. Cal. 2020). Moreover, the State left untouched a plethora of alternative channels for Plaintiffs to engage in religious speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *see also Givens v. Newsom*, 2020 WL 2307224, at *5 (E.D. Cal. 2020)

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provides exceptions for unvaccinated individuals to remove their masks to engage in religious ceremonies. Thus, there would be no conceivable basis to challenge it. And, it would also be far too late now for Plaintiffs to amend yet again to challenge the currently operative guidance.

("[T]he government 'need not [use] the least restrictive or least intrusive means' available to achieve its legitimate interests."); *see Ukiah* 2021 WL 916213, at *12-*13.

C. Plaintiffs Fail to State a Cognizable Equal Protection Claim Against the State's Defunct Singing or Face-Covering Requirements

The Equal Protection Clause forbids the government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Equal Protection requires only that the classification rationally further a legitimate state interest unless "a [statutory] classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic[.]" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). As shown above, Plaintiffs have not plausibly alleged that the singing or face-covering restrictions at issue impinged on any fundamental right or otherwise trigger heightened scrutiny under the Equal Protection Clause. Thus, they are subject to, and easily satisfy, rational basis review, because they serve the government's compelling interest in slowing the spread of COVID-19. *Ukiah*, 2021 WL 916213; *Young*, 2021 WL 1299069.

CONCLUSION

The Court should dismiss the TAC with respect to the State defendants.

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Respectfully submitted,

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