Robert H. Tyler, Esq., CA Bar No. 179572
rtyler@tylerbursch.com
Mariah Gondeiro, Esq. CA Bar No. 323683
mgondeiro@tylerbursch.com
Papillon Boyd, Esq. CA Bar No. 326544
pboyd@tylerbursch.com
Tony Black, Esq. CA Bar No. 331180
tblack@tylerbursch.com
TYLER & BURSCH, LLP
25026 Las Brisas Road
Murrieta, California 92562
Tel: (951) 600-2733
Fax: (951) 600-4996

Attorney for Defendants

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, and SARA H. CODY, M.D., in her official capacity as Health Officer for the County of Santa Clara,

Plaintiffs,

v.

CALVARY CHAPEL SAN JOSE; MIKE MCCLURE, and DOES 1-50, ,

Defendants.

No. 20cv372285

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE RE: CONTEMPT AND/OR SANCTIONS

Date: January 14, 2020
Time: 2:00 p.m.
Dept: D19

DEFENDANTS Calvary Chapel San Jose and Mike McClure, and Carson Atherley hereby submit the following Memorandum of Points and Authorities in Opposition to Plaintiffs' Request for Contempt and/or Sanctions and request the application be denied.

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I. INTRODUCTION

Until last month, COVID-19 era courts have turned a blind eye to discrimination against religious worship services and rubber-stamped government abuse. On November 25, 2020, the Supreme Court intervened and directed all lower courts that the First Amendment right to free exercise will no longer be ignored during this pandemic.

> Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

(*Roman Catholic Diocese of Brooklyn v. Andrew M. Cuomo* 592 U.S. ___ (2020) [2020 U.S. LEXIS 5708, at **12-13] [Gorsuch, N. concurring] ("**Diocese of Brooklyn**") (citing to *South Bay United Pentecostal Church v. Newsom* (2020) 140 S. Ct. 1613) ("**South Bay**").)

This Court should not hold Defendants Calvary Chapel San Jose ("**Calvary**"), Mike McClure, and respondent Carson Atherley[1] (Collectively referred to as "Defendants") in contempt because such a decision would defy Supreme Court and Ninth Circuit precedent. The public health orders enforced by the Modified Temporary Restraining Order (TRO) and Court's Order on Preliminary Injunction are unquestionably unconstitutional. Given the decisive precedent and the extreme inequity between the Plaintiffs' unlimited resources and the Defendants' limited means, fining and/or sanctioning the Defendants and Carson Atherley for defending constitutional liberties would irredeemably violate the interests of justice. This Court should therefore deny the Plaintiffs' Ex Parte Application.

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[1] Carson Atherly is an employee of Calvary and is not named as a defendant in this litigation but was named in the pending motion for contempt as a responding party.

II. FACTUAL BACKGROUND

State and County Orders

On August 28, 2020, the State Public Health Officer issued a public health order that set forth guidelines for reopening the state. (Ex. C at pp. 346-49.) These guidelines included a procedure for assigning counties to one of four tiers known as the Blueprint for a Safer Economy ("**Blueprint**"). (*Id.*)

Under the Regional Order, essential critical infrastructure workers and operations are permitted to operate indoors while churches are only allowed to operate outdoors. (*Id.*) If the Regional Order is lifted and no intervening orders are adopted, the County of Santa Clara will likely remain under Tier One of the Blueprint. (*Id.*)

On October 5, 2020, the County issued a Revised Risk Reduction Order requiring all residents to heed any directives of the County Health Officer. (Ex. B at pp. 271-80.) Accordingly, Dr. Sara H. Cody issued a Revised Gatherings Directive on October 13, 2020. (*Id.* at p. 281-291.) The October 13, 2020 Directive was more restrictive than the Blueprint because it only allowed indoor religious gatherings of up to 25% of the facility's capacity or 100 people, whichever was fewer, in Tier Three. (*Id.* at p. 284.) Meanwhile, the State allowed churches to open at a maximum capacity of 50% or 200 people, whichever was fewer, under Tier Three. (Ex. C at p. 356.)

On November 16, 2020, the State of California announced it was moving Santa Clara County back into Tier One (Purple) from Tier Three (Orange). (Ex. B, at 295-306.) Around that same time, the County issued a Mandatory Directive on Capacity Limitations. (Ex. C at 550-56.) The County Directive on Capacity Limitations allows shopping centers, retail stores, grocery stores and public transit to operate indoors but worship services are banned indoors. (*Id.*) Religious services are only allowed outside subject to limitations as set forth in the Revised Gatherings Directive issued on November 16, 2020. (Ex. C at 297-98.) The outdoor requirement in the November 16 Gatherings Directive does not apply to many activities and industries like childcare, train stations, airports, businesses, and restaurants. (*Id.*)

On December 3, 2020, the State Public Health Officer established the "Regional Stay At Home Order," ("**Regional Order**") that orders all persons to stay at home except as necessary for

critical infrastructure, as required by law or as otherwise permitted by the order. (*Id.* at p. 311-14.) The Regional Order forbids houses of worship to meet indoors in Santa Clara County. (*Id*.)

Calvary, Mike McClure, and Carson Atherley

Calvary has gathered in-person since Pentecost Sunday, May 31, 2020. (Declaration of Mike McClure ["McClure Decl."] at ¶ 3.) Calvary meets inside because it cannot find an outdoor space large enough to accommodate its 800-1000 attendees (approximately 400 to 500 per service), and outdoor services are also not feasible when you have to consider parking, childcare, restroom space, electricity, and unpredictable weather conditions. (*Id.* at ¶ 11.) Many religious activities like baptisms, one-on-one prayers, and communion are impossible to replicate online. (*Id*.) The sanctuary building is 18,000 square feet and has the capacity to seat 1800 people. (*Id.* at ¶ 2.)

Since reopening five months ago, Calvary has not experienced any known COVID-19 case. (*Id.* at ¶¶ 9-10.) However, Calvary has experienced a significant increase in spiritual and mental distress. (*Id.* at ¶¶ 5-6.) In fact, McClure has been in contact with people who are suffering from anxiety, depression, and even thoughts of suicide. (*Id.*) This is consistent with the increase of suicides and calls to the suicide hotline in Santa Clara County. For instance, the County experienced an increase of approximately 8,000 people who called the suicide hotline. (Ex. E at p. 2.; Ex. F at p. 3.) Calvary's services have provided a place of refuge for many hurting people in the County. (McClure Decl. at ¶ 7.)

Indeed, science and studies reveal that church attendance provides critical psychological benefits for attendees. (Declaration of Doctor Jayanta Bhattacharya dated December 31, 2020 [Bhattacharya Decl. dated Dec. 31, 2020], Ex. A, ¶ 43 at p. 378.) Church services alleviate stress and allostatic load (a term indicating stress endured over a long period of time). (*Id.*) Allostatic load can cause psychological and physical harms, including higher incidence of chronic disease and mortality. (*Id.*) In particular, evidence strongly suggests church attendance reduces the rate of depression in adolescents. (*Id.*)

Plaintiffs claim Defendants' conduct will pose a grave threat to the community, but their predictions are not supported by science. Based upon a seroprevalence study conducted in Santa Clara County, the infection survival rate is 100% among people between 0 and 19 years of age;

99.987% for people between 20-39 years of age; 99.84% for people 40-69 years of age; and 98.7% for people above 70 years of age. (*Id.* at ¶41, p. 377.) Further, scientific evidence strongly suggests indoor gatherings are not an important location of disease spread. (Bhattacharya Decl. dated Dec. 31, 2020, at ¶¶ 4-11.)

On the other hand, the fines and sanctions would cause irreparable harm to the Defendants and Carson Atherley. Mr. Atherley is a father to an eight-month-old infant and he, his wife, and his child rely primarily on his pastor salary. (Declaration of Carson Artherley [Atherley Decl.] at ¶ 6.) It would be impossible for him to pay $22,500 in fines and sanctions. (*Id*.) Mike McClure is the father of seven children. (McClure Decl. at ¶ 13-14.) His wife works casually part-time, but they primarily rely on his income. It would be very difficult for him to pay $25,000 in fines and sanctions. (*Id*.)

Procedural Background

Following a hearing on November 23, 2020, the Court issued a Modified TRO on November 24, 2020, that remained in effect until the Court ruled on the Request for a Preliminary Injunction. (See Order Granting Modification of Temporary Restraining Order ["Modified TRO"], Ex. B, pp. 65-69.) The Modified TRO allowed enforcement officers to enter the church premises to ensure compliance with State and County public health orders. (*Id.*) On November 24, 2020, the Court also issued an Order to Show Cause re Contempt and/or Sanctions.

On December 1, 2020, the Court granted the Plaintiffs' Request for a Preliminary Injunction (Ex. B, pp. 77-84.) [2] The Court determined *Diocese of Brooklyn* was not analogous and applied a rational basis standard to the free exercise clause instead of strict scrutiny as applied in *Diocese of Brooklyn*. (*Id.* at p. 7.) However, the Order fails to specify anything that is actually enjoined. (Ex. B, pp. 77-84.)

On December 8, 2020, the Court held Defendants in contempt ordering Calvary to pay $55,000 to the superior court within 60 days for violating the November 2, 2020 TRO. (Order of

[2] The November 24, 2020 Modified TRO and December 4, 2020 Preliminary Injunction are hereinafter referred to as "Court Orders."

Contempt and Violation of Court Order [Dec. 16 Contempt Order] on file.) The Court concluded the November 2, 2020 TRO was a "lawful court order…." (Ex. D at pp. 405-07.) The Contempt Order was based solely on declarations of the County and arguments before the court. (*Id.*) This Court overruled Defendants' objections to the introduction of declarations in lieu of testimony based on hearsay and denied Defendants the right to cross-examine their accusers. (*Id.*)

On December 21, 2020, Defendants submitted a Notice of Appeal. (Ex. C at pp. 350-53.) On December 22, 2020, the County moved for another Order to Show Cause seeking to hold Calvary, Mike McClure and employee Carson Atherley in contempt of court for violating the Modified TRO issued on November 24, 2020, and the Preliminary Injunction issued on December 4, 2020. Plaintiffs' Ex Parte Application for Order to Show Cause Re: Contempt and/or Sanctions ["Plaintiffs' App."] on file.) The Plaintiffs are now requesting $32,000 in fines against Calvary, $10,000 against Mike McClure, and $9,000 in fines against Carson Atherley. (Plaintiffs' App. at p. 11.) The Plaintiffs are also requesting $48,000 in sanctions against Calvary, $15,000 against Mike McClure, and $13,500 against Carson Artherley. (*Id.*)

On December 29, 2020, Defendants filed a Writ Petition for Immediate Stay with the Sixth Circuit Court of Appeal. (Ex. A.) All other underlying facts that led to the recent filings are incorporated by reference in the attached Writ Petition for Immediate Stay (see Ex. A.).

III. ARGUMENT

A. Defendants Cannot be Held in Contempt Because Such an Order Would Exceed This Court's Jurisdiction.

The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment. (*In re Berry*, 68 Cal. 2d 137, 247 (1968).) In other words, "the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt…." (*Id.)* Jurisdiction under this context extends beyond subject or personal jurisdiction. (*Id.)* "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the court and followed under the doctrine of stare decisis, are in excess of jurisdiction, …" (*Albelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 291.)

Here, the Plaintiffs seek to hold Defendants and Carson Atherley in contempt for violating the November 24, 2020 Modified TRO and December 4, 2020 Preliminary Injunction. The Modified TRO required Defendants to comply with then existing State and County Orders in Tier Three of the Blueprint (Ex. B, pp. 65-68). The unconsitutionally vague and undefined Preliminary Injunction presumably enforces the same requirements though it fails to specify what is actually enjoined. The Blueprint is unconstitutional because it treats houses of worship more harshly than secular entities and activities as explained more fully below. (*See* supra, at pp. 7-9.) Thus, this Court, acting in accordance with well-establish precedent, should deny the Plaintiffs' Ex Parte Application for Order to Show Cause.

1. The Court Orders are Unconstitutional in Light of *Diocese of Brooklyn*.

In *Diocese of Brooklyn*, the U.S. Supreme Court issued a per curiam opinion granting an extraordinary writ of injunction barring enforcement of the restrictions on indoor worship contained in Governor Cuomo's Cluster Action Initiative ("Cluster Initiative") (2020 U.S. LEXIS 5708, at **1-2.) Like the Blueprint and accompanying County public health orders at issue here, the Cluster Initiative is a "color-coded executive edict[] that reopen[s] liquor stores and bike shops but shutter[s] churches, synagogues, and mosques." (*Id.* at **19 [Gorsuch, J., concurring].)

The Supreme Court held that the challenged numerical caps in the Cluster Initiative violate the Free Exercise Clause because:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of 'essential' businesses includes things such as acupuncture facilities, campgrounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.

(*Id.* at **3.)

Further, the Court held that "[t]he disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." (*Id.*) Thus, the Court concluded, "the

challenged restrictions are not 'neutral' and of 'general applicability, [and] must satisfy 'strict scrutiny,' [which] means that they must be 'narrowly tailored to serve a 'compelling' state interest'"—which test they failed. (*Id*. at **4-5.)

Notably, Justice Kavanaugh rejected New York's argument that it did not discriminate against religion because some secular businesses like movie theaters were treated equally or more harshly.

> "[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, some secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of business, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."

(*Id.* at **22 (internal citations omitted).)[3]

Here, California has selected clergy[4] and places of worship as "nonessential" while choosing innumerable occupations and operations as "essential." For example, essential critical infrastructure workers and operations include hardware stores (Ex C at p. 539), bicycle repair shops (*id.*), accountants (*id.,* at p. 536), insurance services (*id.*), bus stations (*id.*, at pp. 527-29), airports (*id.*), laundromats (*id.,* at p. 540), banks (*id.,* at p. 536), auto repair/garages (*id*., at p. 528), and acupuncture facilities (*id.*, at p. 519). These same occupations and operations were deemed "essential" by Governor Cuomo's health orders and referenced by U.S. Supreme Court justices to

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[3] Importantly, this is the exact error this Court made in its ruling on the preliminary injunction by only comparing houses of worship with other indoor gatherings. "As these public health orders apply neutrally to both secular and non-secular gatherings, the Court finds that they are subject to a rational basis review …." (Ex. B, p. 83.) As articulated by Justice Kavanaugh, it does not suffice for the State and County to argue that houses of worship are treated similarly to other secular gatherings. Just as in *Diocese of Brooklyn*, the State and County have created a favored class of occupations and operations that selectively excludes houses of worship.

[4] Services provided by clergy are only deemed part of the essential critical infrastructure in California when provided "for essential support" and when "faith-based services that are provided through streaming or other technologies that support physical distancing and state public health guidelines." (Ex. C at p. 533.)

show discriminatory treatment against places of worship in *Diocese of Brooklyn.* (2020 U.S. LEXIS 5708, at **3-4, 10-11.)

Under California's Regional Order, essential critical infrastructure workers and operations are permitted to operate indoors while churches are only allowed to operate outdoors. (Ex. C at pp. 311-315.) This disparate treatment is more egregious than the majority deemed unconstitutional in *Diocese of Brooklyn* because California does not allow any worship services indoors regardless of the number of worshippers or the capacity of the building. (*Id.*)

Furthermore, California's color-coded tier system (the Blueprint) is also unlawfully discriminatory. California's occupancy restrictions on religious services are plainly greater than those imposed on other industries. (*Id*. at pp. 311-315.) In Tier One, there continues to be a total ban on indoor worship, while other operations are permitted to meet indoors including all the "critical infrastructure" mentioned above (*id.* at p. 354), hair salons (*id.*), barbershops (*id.*) all retail (*id.* at p. 355), shopping malls and swap meets (*id*.), personal care services (*id.*), and hotels and lodging (*id.,* p. 356.)

In sum, the State and County public health orders have not been neutral and generally applicable considering *Diocese of Brooklyn* because they selectively choose those occupations and operations deemed essential versus those deemed nonessential. Furthermore, they arbitrarily regulate venue capacity stringently against churches but not against other indoor venues including essential and non-essential businesses and activities.

Cementing the broader impact of *Diocese of Brooklyn,* the U.S. Supreme Court cited *Diocese of Brooklyn* just over a week later in *Harvest Rock Church v. Newsom* (U.S. Dec. 3, 2020) 592 U.S. __, 2020 WL 7061630 (Order). Specifically, in *Harvest Rock Church*, the U.S. Supreme Court *vacated* the district court's decision and remanded *Harvest Rock Church* to the district court in light of *Diocese of Brooklyn*. (*Id.*) More recently, the Ninth Circuit vacated the district court's decision in *South Bay Pentecostal Church v. Newsom* (9th Cir. Dec. 8, 2020), 2020 U.S. App. LEXIS 38254, denying the motion for injunctive relief filed by South Bay and remanding it to the district court for further consideration. The district courts in both *Harvest Rock Church* and *South Bay Pentecostal*

Church had both found that Governor Newsom's health orders were constitutional, only to be overturned by the U.S. Supreme Court and the Ninth Circuit.

If it was not clear enough, on December 15, 2020, the Ninth Circuit held Nevada Governor Steve Sisolak's "Directive" was not neutral because it treated many secular entities like retail businesses and body-art and piercing facilities better than houses of worship. (*Calvary Chapel Dayton Valley v. Sisolak* (9th Cir. Dec. 15, 2020) 2020 U.S. App. LEXIS 39266.) In *Calvary Chapel Dayton Valley*, secular entities were limited to 50% percent of fire-code capacity while houses of worship were limited to 50 people regardless of the building's fire-code occupancy. (*Id.* at *2-3.) These cases all but assure the State and County's public health orders are not neutral and are dispositive in this case.[5]

2. Strict Scrutiny is Applicable to the State and County Health Orders and the Court Orders.

This Court previously applied rational basis review to the State and County health orders when it was obligated to apply strict scrutiny,[6] resulting in unconstitutional Court Orders. In *Calvary Chapel Dayton Valley,* the court issued a preliminary injunction, holding that Nevada's COVID-19 restrictions on religious worship services could not survive strict scrutiny citing *Diocese of Brooklyn*

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[5] See also, *Agudath Israel v. Cuomo* (6th Cir. 2020) 2020 WL 7691715, *1 ("[t]he Governor's order is subject to strict scrutiny because it is not neutral on its face and imposes greater restrictions on religious activities than on secular ones"); *Robinson v. Murphy* (U.S. Dec. 15, 2020) 2020 WL 7346601 (vacating an order by the New Jersey District Court and remanding to the Third Circuit for further consideration in light of *Diocese of Brooklyn*); *High Plains Harvest Church v. Polis* (U.S. Dec. 15, 2020), 2020 WL 7345850 (vacating an order by the Colorado District Court and remanding to the Tenth Circuit for further consideration in light of *Diocese of Brooklyn*); *Burfitt v. Newsom* (Super. Ct. Kern County, 2020), No. BCV-20-102267 (Ex. C at pp. 455-61) (held California's health orders unlawful as it relates to places of worship); *Midway v. County of San Diego* (Super. Ct. San Diego County, 2020), No. 37-2020-00038194-CU-CR-CTL (Ex. C at. pp. 447-454) (held California's health orders unlawful as it relates to freedom of expression); *California Restaurant Assoc. v. County of Los Angeles* (Super. Ct, Los Angeles County, 2020), No. 20STCV45134 (Ex. C at pp. 462-515) (held Los Angeles County failed to show sufficient evidence to justify ban on outdoor dining).

[6] "As these public health orders apply neutrally to both secular and non-secular gatherings, the Court finds that they are subject to a ratinoal basis review and concludes that they are rationally related to a legitimate governmental purpose…." (Ex. B, p. 83.)

and must be enjoined. (*Calvary Chapel Dayton* 2020 U.S. App. LEXIS 39266, at *10-11). Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. The court recognized that *Diocese* of Brooklyn cannot be read to allow "treat[ing] numerous secular activities and entities significantly better than religious worship services" as anything more than "disparate treatment of religion," which must survive strict scrutiny. (*Calvary Chapel Dayton Valley*, 2020 U.S. App. LEXIS 39266, *9.)

The restrictions on religious worship services in *Calvary Chapel Dayton Valley* were **less** restrictive than the total prohibition here. (*Compare id.* at *3-4 (noting that the Nevada restriction imposed a 50-person cap yet indoor worship is prohibted in the state of California).) Yet, the court still held that "although less restrictive in some respects than the New York regulation reviewed in *Roman Catholic Diocese*—is not narrowly tailored." (*Calvary Chapel Dayton Valley*, 2020 U.S. App. LEXIS 39266, at *10 (emphasis added).) Likewise, strict scrutiny renders the State and County health orders and the Court Orders unconstitutional as they are not narrowly tailored because they treat numerous secular activities and entities significantly better than religious worship services.

3. The Plaintiffs' Continued Insistence That Their Expert Testimony Justifies Discrimination Against Religious Worship Services Was Likewise Argued to the Supreme Court and Plainly Rejected.

Plaintiffs cannot satisfy strict scrutiny through reliance on their so-called expert witnesses. Plaintiffs continue to focus on the rising positivity and deaths due to COVID-19 as justification for the prohibition of indoor worship. (Plaintiffs' Ex. Parte App. at pp. 1-2.) But as Judge O'Scannlain pointed out, Governor Newsom has already "conceded" that the experts he relies upon to justify harsher restrictions on churches are "*not qualified as an expert to opine on what takes place at religious worship services or how people interact there as opposed to in other settings of public life.*" (*Harvest Rock Church, Inc. v. Newsom* (9th Cir. 2020) 977 F.3d 728, 735 n.4 (O'Scannlain, J., dissenting) (emphasis added)).

Even if the County has not conceded that their so-called experts are not experts at all, the precise arguments those "experts" are making here were presented to the Supreme Court in *Diocese of Brooklyn* and were rejected. (*Diocese of Brooklyn*, 2020 U.S. LEXIS 5708, at **30 [J. Breyer dissenting].)Thus, despite claiming that Defendants' religious worship services pose the grave danger of the spread of COVID-19, the Plaintiffs have yet to prove any COVID-19 case connected to Calvary. The reason for this is simple, much like in *Diocese of Brooklyn*: there is no evidence "that attendance at [Defendants'] services has resulted in the spread of the disease." (*Diocese of Brooklyn*, 2020 U.S. LEXIS 5708, at **5-6.)

Moreover, not a single hypothesis presented in this case was unknown by the scientific and governmental communities at the time *Diocese of Brooklyn* was decided. In fact, the precise arguments made by the County and purportedly supported by "expert" declarants were made to the Supreme Court in *Diocese of Brooklyn* and relied upon by the dissenting justices to suggest the same contention made here- to no avail. (*See, e.g., Diocese of Brooklyn*, 2020 U.S. LEXIS 5708, at **30-31, 34 (Breyer, J., dissenting) (noting that "members of the scientific and medical communities tell us that the virus is transmitted" more easily in gatherings with features of religious worship services); *Id.* at **39 (Sotomayor, J., dissenting) (noting that "medical experts tell us . . . large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time" pose a greater risk of spreading COVID-19 than other gatherings).)[7]

The Supreme Court and Ninth Circuit have concluded discriminatory restrictions on worship services cannot survive strict scrutiny. (*See, e.g., Id.* at *6. (Finding Governor Cuomo's restrictions were not narrowly tailored because it was hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows); *Calvary Chapel Dayton Valley*, 2020 U.S. App. LEXIS 39266,

[7] As the Second Circuit recognized – equally true here – "the Governor's identification of those risks relied on broad generalizations made by public-health officials about inherent features of religious worship," [but] "the government must normally refrain from making assumptions about what religious worship requires." (2020 WL 7691715, at *8.)

at *10 (concluding that even though Governor Sisolak's orders were less restrictive in some respects than the New York regulations in *Diocese of Brooklyn*, the restrictions were not narrowly tailored).)

Thus, any indication that indoor gatherings somehow pose a greater threat that justifies harsher treatment on places of worship is speculative and has been tried and rejected by the higher courts.

B. Court-Ordered Fines, Sanctions, and Attorney's Fees Would be an Abuse of Discretion and Unjust.

The county never should have brought this motion for contempt in the first place. Notwithstanding the prior court's errant ruling on contempt, the County can hardly argue in good faith that the U.S. Supreme Court precedent in *Diocese of Brooklyn* is still inapplicable. This is especially true because the Ninth Circuit further solidified the applicability *Diocese of Brooklyn* in *Calvary Chapel Dayton Valley.*

The underlying Modified TRO and Preliminary Injunction are, at a minimum, burdened by a cloud of invalidity. The prohibition of indoor worship is an unconstitutional condition upon which the TRO and Preliminary Injunction are based. Even if the County and State health orders are deemed constitutional in the future, their validity is so suspect today that the County's enforcement action is unjust.

Furthermore, Defendants and Mr. Carson were, and are, justified in believing that the State and County health orders and the Court Orders are unconstitutional. Defendants and Mr. Carson should not be punished for defending First Amendment liberties in an era when government overreach is rampant. The financial impact upon the government for preparing and filing this motion is minimal. But on the other hand, awarding attorney's fees against a church, a pastor, and an employee of the church would send a strong message to the entire community that defending constitutional liberties is too risky and unbearable. This is not the message Congress intended to give by only allowing private persons to recover attorney's fees (and not the government) under 42 U.S.C. Section 1988 in civil rights lawsuits. The policy of encouraging citizens to defend their constitutional liberties is even more important today. Further, requiring Defendants and Carson

Atherley to pay fines and sanctions would be unjust considering their lack of means and the County's unlimited means. (*See* Infra at pp. 4-5.)

Therefore, we request that the attorney's fees demand by the county be denied because such an award would result in an unjust outcome.

C. The Preliminary Injunction is Vague, Overbroad and Therefore Unenforceable

The Order granting the preliminary injunction fails to define anything that is actually enjoined. Clearly, an order that fails to specify what is prohibited can hardly be deemed constitutional or enforceable. (*In re Berry* (1968) 68 Cal. 2d 137, 151 (order is unconstitutionally overbroad in that it improperly restricts the exercise of First Amendment freedoms, and further that it is too vague and uncertain to satisfy the requirements of notice and fair trial which are inherent in the due process clause of the Fourteenth Amendment").) "It is clear that constitutionally permissible restrictions upon the exercise of First Amendment rights must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden. When restrictions in the area of free expression are at issue, an appeal to "context" is insufficient to satisfy constitutional requirements of precision." (*Id.* at 155.)

IV. CONCLUSION

The Court Orders and the State and County Health Orders are unquestionably unconstitutional in light of *Diocese of Brooklyn* and *In Re Berry.* Accordingly, the Court Orders are not valid, and Defendants and Carson Atherley should not be held in contempt. Plaintiffs' request should be denied.

DATED: December 31, 2020

TYLER & BURSCH, LLP

By: _____
Robert H. Tyler, Esq.
Mariah R. Gondeiro, Esq.
Attorneys for Defendant **Calvary Chapel San Jose and Mike McClure**

PROOF OF SERVICE

The People of the State of California v. Calvary Chapel San Jose
Santa Clara Superior Court Case No. 20cv372285

I am an employee in the County of Riverside. I am over the age of 18 years and not a party to the within entitled action; my business address is 25026 Las Brisas Road, Murrieta, California 92562.

On December 31, 2020, I served a copy of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S REQUEST FOR CONTEMPT AND/OR SANCTIONS** on the interested party(ies) in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I transmitted copies of the above-referenced document(s) on the interested parties in this action by electronic transmission. Said electronic transmission reported as complete and without error.

☐ **BY FACSIMILE TRANSMISSION.** Pursuant to agreement and written confirmation of the parties to accept service by facsimile transmission, I transmitted copies of the above-referenced document(s) on the interested parties in this action by facsimile transmission from (951) 600-4996. A transmission report issued as complete and without error.

☐ **BY UNITED STATES POSTAL SERVICE.** I am readily familiar with the practice for collection and processing of correspondence for mailing and deposit on the same day in the ordinary course of business with the United States Postal Service. Pursuant to that practice, I sealed in an envelope, with postage prepaid and deposited in the ordinary course of business with the United States Postal Service in Murrieta, California, the above-referenced document(s).

☐ **BY OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package provided by an overnight delivery carrier and addressed as above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY PERSONAL SERVICE.** I caused copies of the above-referenced documents to the addressee(s) noted above served by process server.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am an employee in the office of a member of the bar of this Court who directed this service.

Shelly Padilla

Shelly Padilla

SERVICE LIST

The People of the State of California v. Calvary Chapel San Jose
Santa Clara Superior Court Case No. 20cv372285

James R. Williams, Esq.
County Counsel, County of Santa Clara
Melissa R. Kiniyalocts, Esq,
Lead Deputy County Counsel
Jeremy A. Avila, Esq.
Deputy County Counsel
Meredith A. Johnson, Esq.
Deputy County Counsel
70 West Hedding Street, East Wing, Ninth Floor San José, California 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240
Melissa.Kiniyalocts@cco.scgov.org
Jeremy.avila.@cco.scgov.org

Jeffrey F. Rosen, Esq.
District Attorney
DAVID ANGEL, Esq.
Assistant District Attorney
70 West Hedding Street, West Wing San José, California 95110-1770
Telephone: (408) 299-7400
Facsimile: (408) 299-8440
Jrosen@dao.sccgov.org
dangel@dao.sccgov.org

Attorneys for Plaintiffs, The People of the State of California, County of Santa Clara and Sara H. Cody M.D.