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

CALVARY CHAPEL SAN JOSE; MIKE McCLURE

Appellants-Defendants

vs.

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

Respondents-Plaintiffs

PETITION FOR PANEL REHEARING

Appeal from Superior Court of Santa Clara County

Case No. 20CV372285

The Honorable Evette D Pennypacker

Department 6

(408) 882-2160

ADVOCATES FOR FAITH & FREEDOM

Robert H. Tyler, CA Bar No. 179572

rtyler@faith-freedom.com

25026 Las Brisas Road

Murrieta, California 92562

Tel: (951) 600-2733

Fax: (951) 600-4996

Attorneys for Appellants,

CALVARY CHAPEL SAN JOSE and

MIKE McCLURE

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	2
I. INTRODUCTION	6
II. STATEMENT OF FACTS	7
A. Factual Background.....	7
1. November 2, 2020, TRO.....	7
2. The November 9, 2020, Notice of Violation	9
3. The Nov. 2 TRO was found to be unconstitutional by this Court.	11
4. The People’s reliance on the failure to submit a compliance letter for the continual violations.....	12
III. ARGUMENT.....	12
A. The Court’s Ruling Contradicts The Law Of This Case: That The Nov. 2 TRO Is Unconstitutional	12
B. It Is Unconstitutional To Require Calvary Chapel To Comply With An Unconstitutional Condition	16
C. A Court Order Enforcing An Unconstitutional Order Violates The Due Process Clause	16
D. The Free Exercise Clause Was Violated	18
1. The relevant laws include the face covering orders and the Nov. 9 NOV	19
2. The Court erred by placing the burden of proving comparability on Calvary Chapel.....	19
3. The face covering orders encompass a system of individualized exemptions	21
4. It is undisputed that Calvary Chapel’s religious beliefs were infringed.	22
5. The People cannot satisfy strict scrutiny	22
E. The Fine Violates The Eighth Amendment.....	24
F. There Are Significant Disputes Of Fact Warranting Trial In This Matter	25

IV. CONCLUSION27
CERTIFICATE OF COMPLIANCE.....28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	23
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	22, 23
<i>Clark v. Arizona</i> , 548 U.S. 735 (2006).....	13
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986).....	16
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	25
<i>Fulton v. City of Philadelphia</i> , 593 U.S. 522 (2021).....	18, 21, 22
<i>Koontz v. St. Johns River Water Management Dist.</i> , 570 U.S. 595 (2013).....	16, 17, 23
<i>Macmillan Petroleum Corp. v. Griffin</i> , 99 Cal.App.2d 523 (1950).....	15, 16
<i>Millipore Corp. v. Travelers Indem. Co.</i> , 115 F.3d 21 (1st Cir. 1997)	25
<i>People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.</i> , 37 Cal.4th 707 (2005)	24
<i>People v. Calvary Chapel San Jose</i> , 82 Cal.Ap.5th 235, 298 Cal.Rptr.3d 262 (Ct. Ap. 6th Cir. 2022).....	passim
<i>People v. Gonzalez</i> , (1996) 12 Cal.4th 804, 50 Cal.Rptr.2d 74, 910 P.2d 1366	15
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	17
<i>Pimentel v. City of Los Angeles</i> , 974 F.3d 917 (9th Cir. 2020).....	25
<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	16, 17
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 592 U. S. 14 (2020).....	18, 20, 23
<i>South Bay United Pentecostal Church v. Newsom</i> , 141 S.Ct. 716 (2021).....	19, 24
<i>Stacy v. Colvin</i> , 825 F.3d 563 (2016).....	15
<i>Tandon v. Newsom</i> , 593 U.S. 61 (2021).....	passim

<i>Thomas v. Review Bd. of Indiana Emp't Sec. Div.</i> , 450 U.S. 707 (1981).....	22
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	24
<i>United States v. Scott</i> , 450 F.3d 863 (9th Cir.2006).....	17
 Statutes	
Cal. Code Civ. Proc., § 1010.6, subd. (a)(2)(A)(ii).....	26

I. INTRODUCTION

The Court should reconsider its ruling and reverse the decision and fine imposed by the trial court. This Court's ruling was based on the November 2, 2020 TRO ("Nov. 2 TRO") that was already declared to be unconstitutional on its face and void. The November 9, 2020, Notice of Violation ("Nov. 9 NOV" or "NOV"), which is the basis for this action, was predicated on Defendant-Appellants Calvary Chapel San Jose and its pastor Mike McClure ("Defendants" or "Calvary Chapel") complying with the Nov. 2 TRO and submitting a sworn letter that it is in compliance with the various public health orders and the Nov. 2 TRO.

In rendering its opinion, this Court did not properly consider the law of the case, which was that the Nov. 2 TRO and the various public health orders were already found to be unconstitutional. See *People v. Calvary Chapel San Jose*, 82 Cal.Ap.5th 235, 298 Cal.Rptr.3d 262 (Ct. Ap. 6th Cir. 2022) ("In the present case, we agree with Calvary Chapel that the November 2, 2020 temporary restraining order is unconstitutional on its face as to that portion of the order that compelled Calvary Chapel to comply with the public health order's capacity limitations on indoor gatherings.... [W]e determine the portion of the November 2, 2020, temporary restraining order that enjoined Calvary Chapel from holding any indoor gathering that did not comply with the capacity limitations of 100 people or 25 percent of capacity is unconstitutional because it discriminated against a religious institution in violation of the Free Exercise Clause of the First Amendment.")

Because the law of the case is that the Nov. 2 TRO was void and unconstitutional, any fine imposed in this case predicated on a requirement that Calvary Chapel comply with the TRO and/or all health orders is unconstitutional. It is inherently unfair and unreasonable to assess any fine,

let alone a \$1.2 million dollar fine, because a party did not comply with an unconstitutional Order.

One of the factors this Court considered in the Eighth Amendment claim was the culpability of Calvary Chapel. But Calvary Chapel cannot be found to be culpable for not following an Order that was unconstitutional. In addition, culpability necessarily requires comparison, and the culpability of the State of California, the County of Santa Clara and Sara H. Cody, M.D. (“People”) in requiring Calvary Chapel to comply with an unconstitutional Order is great and should have been considered.

Because the law of the case is that the Nov. 2 TRO was void and unconstitutional, the violations of the Free Exercise Clause, Due Process Clause and the Eighth Amendment are more pronounced. Whether strict scrutiny or rational basis review is applied, the People cannot require Calvary Chapel to follow an unconstitutional order before engaging in its religious beliefs and practices.

Finally, this Court misapplied the Supreme Court precedent on whether strict scrutiny should be applied to infringements on Calvary Chapel’s religious beliefs.

II. STATEMENT OF FACTS

A. Factual Background

1. November 2, 2020, TRO

In October 2020, the same parties involved in this case were involved in a legal dispute involving the same issues in this Court, case numbers H048708, H048734, H048947. *See People v. Calvary Chapel San Jose*, 298 Cal.Rptr.3d 262 (Ct. App. 2022). The People (the State of California, the County, and Dr. Cody) filed a complaint for injunctive relief against defendants Calvary Chapel and its senior pastor, Mike McClure.

The People alleged that Calvary Chapel had failed to comply with certain state and county public health orders relating to COVID-19. To authorize enforcement of these and other pandemic-related public health orders, the County adopted Urgency Ordinance No. NS-9.921, which created “a comprehensive civil enforcement program to combat the spread of COVID-19.” *Id.* at 267. The Urgency Ordinance included a schedule of fines for violation of the public health orders, as confirmed or observed by the County’s code enforcement officers during their investigation of public complaints. *Id.*

After receiving a complaint about Calvary Chapel, the County issued a cease-and-desist letter on August 21, 2020, that demanded Calvary Chapel comply with the public health orders and cease to hold indoor gatherings. *Id.* After the County’s code enforcement officers’ investigations revealed that Calvary Chapel had continued to violate the public health orders, they issued a series of notices of violation of health officer orders from August 23, 2020, to October 25, 2020. According to the People, Calvary Chapel had accrued more than \$350,000 in fines due to Calvary Chapel's public gatherings and violations of the requirements for social distancing, face coverings, and submission of a social distancing protocol. *Id.*; 5CT, p. 1469.

The People sought a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining Calvary Chapel “from conducting any gathering or service that does not fully comply with relevant State and County public health orders, including the Risk Reduction Order, the Gatherings Directive, the State August 28 Order, the Revised Risk Reduction Order, and the Revised Gatherings Directive.” *Id.*; 1CT, p. 254.

The trial court granted the application in a November 2, 2020 order. *Id.* at 267-68. The Nov. 2 TRO enjoined Calvary Chapel from:

1. Conducting any gathering that does not fully comply with both the State and County public health orders, including but not limited to: holding gatherings indoors in excess of 100 people or 25% of capacity, whichever is less; holding outdoor gatherings in excess of 200 people; allowing participants to attend gatherings without wearing face coverings; allowing participants to attend gatherings without maintaining adequate social distance; and allowing singing at indoor gatherings;

2. Operating, whether indoors or outdoors, without the prior submission and implementation of a Social Distancing Protocol.

Id.

2. *The November 9, 2020, Notice of Violation*

On November 9, 2020, the County issued the NOV against Calvary Chapel. 8CT, p. 2105. The NOV stated that delivery was done via personal delivery, posting at property and email. (Vol. 4, 1179). The NOV stated that the property was inspected by County Enforcement Officers on Monday, November 9, 2020, at 6:27 p.m. It stated,

Based on the evidence of your repeated violations and your refusal to comply with the Public Health Orders even after receiving the County's August 21, 2020 Cease and Desist Letter and Notices of Violation issued on August 23, August 30, September 6, September 13, September 20, September 27, October 4, October 11, October 18, October 25, November 1 and November 8, 2020, and given the severe and immediate threat that these violations pose to public health, the following fines are imposed effective immediately and without grace period:

1. \$1,000 fine for failure to require use of face coverings among clients, customers, and visitors at the business facility when in an indoor space open to the public and during gatherings, as required by Sections 5 and 10 of the Revised Risk Reduction Order, the Gatherings, Directive and the State Guidance.

2. \$1,000 fine to failure to require use of face coverings among all personnel (including, without limitation, employees, owners, contractors and volunteers) at the business facility.

8CT, p. 2106.

The NOV then said,

You are required to correct the violations listed above and submit a compliance statement to the Enforcement Officer at the email below. Until you have done so, the fines specified below accrue on a daily basis. As explained further below, daily fines double each day they are not corrected, up to the daily maximum of \$5,000 per violation. A violation is not considered corrected until you have submitted a sworn compliance statement that confirm your compliances and the County has verified that the violation has, in fact, been corrected.

Id.

The NOV detailed what type of corrective measures were required: “You must immediately comply with the Public Health Orders and the November 2 TRO” *Id.* at 2107.

The NOV stated that “if you do not perform and maintain the required corrections, the County will continue to impose the fines specified above until the violations are corrected.” *Id.*

While the NOV states it was delivered via posting at the property, personal delivery and email, no one from Calvary Chapel received the Notice. The county official stated that on November 9, she was shown around the church by an individual named “Perry.” 8CT, p. 2167. She then testified she went back to her vehicle to write up the violation and when she returned she gave the violation to another gentleman. 8CT, p. 2135. She did not get the gentleman’s name, nor did she seek to find Mr. Perry who had been showing her around. Instead she “figured” the man “would be the

representative of the church.” However, she did not ask for the man’s name or if he was a representative.

Prior to the NOV, the County served all 12 prior NOVs via personal delivery and email delivery to Carson Atherley. (Atherly Decl. Att. 1, ¶¶ 2-5; Gondeiro Decl. 5CT 1374, ¶ 8).

Except Pastor Mike McClure (listed as agent for service of process with the SOS), Pastor Atherly was the only other person given authority to accept service (Atherly Decl. Att. 1, ¶¶ 2-5).

The NOV stated that a courtesy copy was sent to Robert Tyler, though it does not specify whether the copy was sent to his business office or the errantly listed email address of nhiguera@tylerbursch.com.

3. *The Nov. 2 TRO was found to be unconstitutional by this Court.*

On August 15, 2022, this Court held that the underlying public health orders that the superior court relied on to issue the Nov. 2 TRO were unlawful and that the TRO and subsequent preliminary injunctions were facially unconstitutional and therefore void and unenforceable. *See People v. Calvary Chapel San Jose*, 298 Cal.Rptr.3d at 262, 266, 267, 277, 279 (referenced by the County brief p.19 fn. 7). This Court said, “In the present case, we agree with Calvary Chapel that the November 2, 2020, temporary restraining order is unconstitutional on its face as to that portion of the order that compelled Calvary Chapel to comply with the public health order’s capacity limitations on indoor gatherings.” *Id.* at 280. The Court then proceeded to reverse a contempt finding that was based on the Nov. 2 TRO as the fine was a single, aggregate sanction for violation of the TRO. *Id.* (“As the trial court imposed a single, aggregate sanction for violation of the temporary restraining order,

we must therefore annul the December 17, 2020, order of contempt in its entirety.”)

4. *The People’s reliance on the failure to submit a compliance letter for the continual violations*

Although the People are seeking fines for daily violations from August 2020 through May 2021, they did not personally witness all of these violations. To rectify this omission, the People infer they did not need to witness each violation as Calvary Chapel failed to submit a compliance letter as required by the Nov. 2 TRO. *See, e.g.*, Appellants’ Opening Brief, 16; *See* 1CT, p. 30.

III. ARGUMENT

A. **The Court’s Ruling Contradicts The Law Of This Case: That The Nov. 2 TRO Is Unconstitutional**

A court of appeal may order a rehearing of “any decision that is not final in that court on filing.” (Cal. R. Ct. 8.268(a)(1).) As a policy matter, the California Supreme Court will not normally consider any issue or fact that was omitted from or misstated in the Court’s Opinion, unless the party “has called the Court of Appeal’s attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.” (Cal. R. Ct. 8.500(c)(2)). The Opinion should be reconsidered as it is based on the Nov. 2 TRO which was already found by this Court to be unconstitutional and void. *See People v. Calvary Chapel San Jose*, 298 Cal.Rptr.3d at 262.

Although the People are seeking fines for daily violations from August 2020 through May 2021, they did not personally witness all these violations. This was blatantly obvious when the County issued fines for Christmas Day and New Years Day, both days when the Calvary Chapel was closed and which no official purported to visit the church. *See e.g.* 8CT, p.

2154–2311; *see also* 8CT 2265 (noting a visit to the Church property but not stating there were any violations as the concert planned for that day had been cancelled.) Indeed, the vast majority of the days on which the County has fined Calvary Chapel are days when no enforcement officer witnessed a violation. Compare 2CT, p. 303–390 (Agent Gonzalez testimony); 3CT, p. 826–850 (Agent Sircar Declaration); 4CT, p. 1157–1171 (Agent Gonzalez Declaration); 8CT, p. 2154–2311 (Agent Gonzalez notes); with all dates the Church was alleged to have been in violation to show a majority of the days no agent testified that they witnessed a violation.

The Urgency Ordinance required that the enforcement officer must have either witnessed the violation or determined that a violation did occur through investigation. (Vol 7 CT p. 1941, Section 6(A)); (Vol 7 CT p. 1830 (violations of Urgency Order punishable as a misdemeanor and can result in imprisonment up to 90 days); *see also Clark v. Arizona*, 548 U.S. 735 (2006) (government carries burden in criminal cases).

To rectify this omission, the People infer they did not need to witness each violation as Calvary Chapel failed to submit a sworn compliance statement confirming correction, which the County could then verify. (4 CT 1162 at ¶ 21; 4 CT 1179-82); 5 CT 1366 [SSUMF No. 24, undisputed].); *see also* The People’s Brief, 47 (arguing that the Nov. 9 NOV did not violate Due Process as Calvary Chapel could have ended the fines if it submitted a sworn compliance statement).

The sworn compliance statement referred to is the requirement in the Nov. 9 NOV that Calvary Chapel must swear under oath that it will comply with the public health order and the Nov. 2 TRO. The Nov. 2 TRO stated,

You are required to correct the violations listed above and submit a compliance statement to the Enforcement Officer at the email below. Until

you have done so, the fines specified below accrue on a daily basis. As explained further below, daily fines double each day they are not corrected, up to the daily maximum of \$5,000 per violation. A violation is not considered corrected until you have submitted a sworn compliance statement that confirm your compliances and the County has verified that the violation has, in fact, been corrected.

8CT, p. 2106.

Concerning what type of corrective measures were required, the NOV stated: “You must immediately comply with the Public Health Orders and the November 2 TRO” *Id.*

Indeed, compliance with the Public Health Orders and the Nov. 2 TRO was a consistent theme in the Nov. 9 NOV. The NOV stated, “Our inspections on November 2-6, 2020, revealed that Calvary is engaged in additional ongoing violations because it is operating its facilities without requiring that personnel and the public wear face coverings when indoors. This conduct violates both the Public Health Orders and the Court’s November 2 TRO.” The NOV stated that “if you do not perform and maintain the required corrections, the County will continue to impose the fines specified above until the violations are corrected.” 8CT, p. 2107.

The problem is that any reliance by this Court on the Nov. 2 TRO is fatally flawed as the Nov. TRO was found to be unconstitutional on its face by this Court. The law of this case is that the Nov. 2 TRO is facially unconstitutional. On August 15, 2022, this Court held that the underlying public health orders that the superior court relied on to issue the November 2, 2020, TRO were unlawful and that the November 2, 2020, TRO and subsequent preliminary injunctions were facially unconstitutional and therefore void and unenforceable. *See People v. Calvary Chapel San Jose*, 82 Cal.Ap.5th 235, 298 Cal.Rptr.3d 262 (Ct. Ap. 6th Cir. 2022) (referenced

by the County brief p.19 fn. 7). The court said, “In the present case, we agree with Calvary Chapel that the November 2, 2020, temporary restraining order is unconstitutional on its face as to that portion of the order that compelled Calvary Chapel to comply with the public health order's capacity limitations on indoor gatherings.” *Id.* at 280. The Court then proceeded to reverse a contempt finding that was based on the November 2, 2020, TRO as the fine was a single, aggregate sanction for violation of the TRO. *Id.* (“As the trial court imposed a single, aggregate sanction for violation of the temporary restraining order, we must therefore annul the December 17, 2020, order of contempt in its entirety.”)”

The Law of the Case Doctrine prohibits a court from considering an issue that has already been decided by that same court or a higher court in the same case. *Stacy v. Colvin*, 825 F.3d 563, 567 (2016); *see also People v. Gonzalez* (1996) 12 Cal.4th 804, 823, 50 Cal.Rptr.2d 74, 910 P.2d 1366 (an “order unconstitutional on its face is in excess of jurisdiction and cannot sustain a contempt judgment”). An order based on an illegal order is null and void. *See Macmillan Petroleum Corp. v. Griffin*, 99 Cal.App.2d 523 (1950) (stating that voidness of an Order may be raised at any time: A court may set aside a void order at any time, as “An appeal will not prevent the court from at any time lopping off what has been termed a dead limb on the judicial tree – a void order.”). In its opinion, this Court erred in misciting the Nov. 9 NOV. The Court correctly noted that the NOV stated that the fines would begin immediately and would continue each day until they were corrected. And to correct the violations, the Court said Calvary Chapel must (1) require all attendees to wear face coverings and (2) require all personnel to wear face coverings while attending gatherings. *See Opinion*, 6-7. But this Court left

out a critical component to the imposition of the daily fine – that the fines would continue until Calvary Chapel complied with the Nov. 2 TRO. *Id.*

B. It Is Unconstitutional To Require Calvary Chapel To Comply With An Unconstitutional Condition

As this Court noted in the Opinion, “this court concluded that the temporary restraining orders and preliminary injunctions were facially unconstitutional with respect to the restrictions on indoor gatherings, pursuant to the then recent guidance of the United States Supreme Court regarding the First Amendment’s protection of the free exercise of religion in the contest of public health orders that impact religious practice (see, e.g., *Tandon v. Newsom* (2021) 593 U.S. 6)” Opinion, 9-10.

Because the Nov. 2 TRO was unconstitutional, it made compliance with the Nov. 9 NOV an unconstitutional condition to avoiding the fine. Since it was impossible for Calvary Chapel to comply with the Nov. 9 NOV without forfeiting its constitutional rights, any penalty or fine imposed for failure to comply with the unconstitutional order is null and void. *See e.g., Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 606 (2013) (“the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”)

C. A Court Order Enforcing An Unconstitutional Order Violates The Due Process Clause

The Due process Clause of the Fourteenth Amendment embodies a substantive component that protects against “certain government actions regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Where the right infringed is fundamental, strict scrutiny is applied. *Reno v. Flores*, 507 U.S. 292, 301–02

(1993). To survive review, the challenged regulation must be narrowly tailored to promote a compelling Government interest. *Id.*

Here, there is no dispute that the targeted activity was religious expression. Calvary Chapel is a church, and the targeted activity was its religious worship. In addition, Calvary Chapel's religious beliefs concerning face mask wearing are undisputed. The activity that Calvary Church was engaged in was the subject of the NOV: religious worship. *See 5CT*, p. 1262–65 (testimony of Pastor McClure describing how prohibited conduct, such as face coverings, violate central tenets of the churches deeply held religious beliefs.)

Consequently, the public health orders enforced against Calvary Chapel must pass strict scrutiny, which means they must serve a compelling governmental interest and must be narrowly tailored to achieve that interest. *See id.* Here, there is no compelling governmental interest in requiring Calvary Chapel to comply with an unconstitutional order. Indeed, the Unconstitutional Conditions Doctrine is premised on the inherent unfairness of requiring a person to forgo their constitutional rights to receive a government benefit. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also United States v. Scott*, 450 F.3d 863, 866–67 (9th Cir.2006). Being forced to forgo a constitutional right just to engage in a fundamental constitutional right is all the more egregious.

And even if the County articulated a compelling governmental interest in the fight against COVID-19, requiring Calvary Chapel to sign a sworn statement certifying they will comply with an unconstitutional order is not narrowly tailored to achieve that interest. *See, e.g. Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 606 (2013) (improper to impose unconstitutional conditions).

D. The Free Exercise Clause Was Violated

The Court erred in its free exercise analysis when it concluded that the face covering requirements are neutral and generally applicable, thus triggering a rational basis review. *See* Opinion, 28. In reaching this conclusion, the Court erred in (1) not considering the Nov. 9 NOV as part of the laws infringing Defendants’ religious exercise, (2) placing the burden of proof on the Defendants in proving that a religious exemption is comparable to the secular exemptions offered, and (3) misapplying the individualized exemptions rule.

In a free exercise challenge, strict scrutiny is appropriate when the law is not neutral or generally applicable. “[G]overnment regulations are not neutral and generally applicable and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom* 593 U.S. 61, 62–63 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. 14 (2020) (per curiam).)

A law is not generally applicable when: (1) it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way;” or (2) it “invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 533–34 (2021).

“[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” *Tandon*, 593 U.S. at 62 (per curiam) (describing secular activities treated more favorably than religious worship that either “have contributed to the spread of COVID–19” or “could” have

presented similar risks). “Comparability is concerned with the risks various activities pose, not the reasons why people gather.” *Id.*

“[T]he government has the burden to establish that the challenged law satisfies strict scrutiny.” To do so in this context, it must do more than assert that certain risk factors “are always present in worship or always absent from the other secular activities” the government may allow. *Id.* (citing *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021) (statement of GORSUCH, J.)).

1. *The relevant laws include the face covering orders and the Nov. 9 NOV*

As a threshold matter, the Court erred by only analyzing the public health orders relating to the face covering requirements, and not also the Nov. 9 NOV. Because the Court issued an Order that enforced an unconstitutional order in violation of the law of the case, the relevant laws are not only the face covering orders, but also the Nov. 9 NOV that required compliance with the unconstitutional Nov. 2 TRO.

2. *The Court erred by placing the burden of proving comparability on Calvary Chapel*

The Court placed the burden of proving that the exemptions were comparable to religious exemptions on Calvary Chapel. *See* Opinion, 30 (“we decide that Calvary Chapel has provided no evidence to create a triable question of fact regarding general applicability.”) (“Calvary Chapel has not shown that these secular activities were comparable to the church activities that subjected Calvary Chapel to fines for violating the face covering requirements.”). This was an error. Once an exception to a regulation or law is shown to exist, the government must demonstrate that the secular activities permitted by the exception do not pose similar risks as the prohibited

religious activities. In *Tandon v. Newsom*, 593 U.S. at 62–63, the Court said, “Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.”

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. at 73, the court said, “Once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.”

Consequently, the burden is not on Calvary Chapel to prove that the secular exemptions are comparable to a religious exemption; it is on the government to justify why houses of worship are excluded.

Here, the face covering orders provided for a myriad of exemptions. Exemptions include construction sites, personal care services, restaurants, youth programs, and athletes competing in sports like basketball, football, and wrestling. (6CT 1604; 6CT 1614; 6CT 1630; 6CT 1646; 6CT 1656; 6CT 1673; 6CT 1689; 6CT 1699; 6CT 1707; 6CT 1722; 6CT 1737-1738; 6CT 1753; 6CT 1768; 6CT 1777; 6CT 1785-1786.)

Under the Urgency Ordinance Exemption, government entities and their contractors are exempt from social distancing, wearing masks, or any other restriction “to the extent that such requirements would impede or interfere with an essential government function....” (7CT 1819-1820.)

Firefighters exempted themselves from the mask mandate while working out. (5CT 1213-1214, ¶¶ 2-3).

Construction workers also removed their masks while working on construction sites, including while working in trenches within six feet of distance from each other. (5CT 1356-1357, ¶¶ 2-3).

The burden is not on Calvary Chapel to prove that the secular activities are comparable to the church activities. Rather, in light of the fact that a myriad of exemptions exists, the burden is on the People to prove that allowing a religious exemption is more dangerous than the permitted exemptions.

3. *The face covering orders encompass a system of individualized exemptions*

In *Fulton*, 593 U.S. at page 537, the court explained that “[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it ‘invite[s]’ the government to decide which reasons for not complying with the policy are worthy of solicitude.”

The Court did not apply this rule correctly. In the same County order, the lower court relied on to enforce its fines against Calvary, it stated that government entities and their contractors are exempt from social distancing, wearing masks, or any other restriction “to the extent that such requirements would impede or interfere with an essential government function....” 7CT 1819-1820. This allows the appropriate authorities to make individualized assessments of when and to whom to grant an exemption.

Participants in athletic activities were granted an exemption, ostensibly on the rationale that masking was inherently incompatible with athletic activity. *See, e.g.*, Opinion, 29.

The County’s July 7, 2020, mandatory directive for construction projects states: “Face coverings must be worn even while working at a construction project unless [] it would create a risk to the person related to their work, in accordance with local, state, or federal workplace safety guidelines.” *See* Opinion, 29.

The Court then concluded a system of individualized exemptions was not created as there was no evidence that such a system existed. *See id.* at 31. But the proof of existence is the policy itself. This same issue was addressed by the U.S. Supreme Court in *Fulton* where the court ruled that the City of Philadelphia had a system of individualized exemptions, even though there was no evidence that any exemptions were ever granted. All that mattered is that exemptions could be given if an appropriate official deemed it appropriate. *See Fulton*, 593 U.S. at page 537 (“The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given”).

Here, the various health orders contain multiple examples of where government officials provided exemptions for people to whom the law should not apply. The July 7 Mandatory Directive allows for exemptions to be made based on individualized assessments. Evidence of actual exemptions is not needed when the law allows for officials to create exemptions from the rule.

4. *It is undisputed that Calvary Chapel’s religious beliefs were infringed.*

The County has not contested Calvary Chapel’s religious beliefs, which if they had, would have been futile. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (stating religious beliefs “‘need not be acceptable, logical, consistent, or comprehensible to others.’”) (quoting *Thomas v. Review Bd. of Indiana Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981)).

5. *The People cannot satisfy strict scrutiny*

“[S]trict scrutiny requires the State to further ‘interests of the highest order’ by means ‘narrowly tailored in pursuit of those interests.’” *Tandon v.*

Newsom, 593 U.S. at 64-65 (citing *Church of Lukumi Babalu Aye*, 508 U.S. at 546). The People cannot prove a compelling governmental interest. In fact, any compelling governmental interest is negated by the high number of exemptions offered. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

In addition, the People do not have a compelling government interest in requiring Calvary Chapel to comply with the unconstitutional Nov. 2 TRO. *See, e.g., Koontz*, 570 U.S. at 595.

Even if the government had a compelling governmental interest, it still fails strict scrutiny because denying a religious exemption to Calvary Chapel is not narrowly tailored. “The government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors ‘are always present in worship or always absent from the other secular activities’ the government may allow.” *Tandon v. Newsom*, 593 U.S. at 62–63.

Instead, narrow tailoring requires the government to show that less restrictive measures of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too. *Roman Catholic Diocese*, 141 S.Ct., at 69-70.

The People could have achieved their interests in a myriad of different ways. Most assuredly, though, forced compliance with an unconstitutional Nov. 2 TRO is not narrowly tailored.

E. The Fine Violates The Eighth Amendment

The Court erred in its Eighth Amendment analysis by not weighing the culpability of the County as compared to the alleged culpability of Calvary Chapel. “The Eighth Amendment to the United States Constitution states: ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ ‘The Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing “‘grossly excessive punishments.’” *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 727 (2005).

The California Supreme Court in *R.J. Reynolds*, 37 Cal.4th 707 identified four factors relevant to deciding whether a fine is unconstitutionally excessive: (1) the defendant’s culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant’s ability to pay. *Id.* at p. 728, citing *United States v. Bajakajian*, 524 U.S. 321, 337–338 (1998).

The culpability of the Church is relatively low. Throughout the COVID-19 ordeal, a common theme was government overreach in trying to suppress religious activity. *See Tandon v. Newsom*, 593 U.S. at 62–63; *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Roman Catholic Diocese*, S.Ct., at 69-70. Even in this case, the record is replete with attempts by the County and State to deny Calvary Chapel’s constitutional rights. *See* Opinion, 6 (“The hearing officer stated that Calvary Chapel’s constitutional challenges to the public health orders were barred from consideration at the hearing by the provisions of the Urgency Ordinance, and therefore the public health orders and Urgency Ordinance would be presumed to be constitutional”); Opinion, 8 (County argued that Calvary

Chapel could not even argue constitutional defenses on appeal); Urgency Order (CT 7, 1844) (“Dispute officer shall only consider evidence that is relevant to whether the violation occurred); Nov. 9 NOV (requiring compliance with unconstitutional Nov. 2 TRO).

Against this backdrop, Calvary Chapel was simply trying to assert its fundamental constitutional rights. As the Supreme Court said in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the denial of constitutional rights for “even minimal periods of time, unquestionably constitutes irreparable injury.”

The proportionality and culpability factors weigh in Calvary’s favor because its good faith adherence to its constitutionally protected religious beliefs renders its culpability low. *See Pimentel v. City of Los Angeles*, 974 F.3d 917, 923 (9th Cir. 2020).

In addition, any mention of adverse health consequences due to Calvary Church’s actions are misplaced at this stage. There are significant disputes of fact that counsel against any consideration of that prior to trial. The County cannot trace a single case of COVID-19 back to the Church or its services, nor can it prove that Calvary’s congregants were exposed to COVID-19 at church gatherings as opposed to somewhere else. 5CT 1431:2-15; *see also Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 34 (1st Cir. 1997).

F. There Are Significant Disputes Of Fact Warranting Trial In This Matter

There is a dispute of fact as to whether the Nov. 9 NOV was ever served on Calvary Chapel. Calvary Chapel did not receive the notice alleged on the Nov. 9 NOV. All twelve prior NOVs were served via personal delivery and email delivery to Carson Atherley. (Atherly Decl. Att. 1, ¶¶ 2-5; Gondeiro Decl. 5CT 1374, ¶ 8.). Except Pastor Mike McClure (listed as agent for service of process with the SOS), Pastor Atherly was the only other

person given authority to accept service (Atherly Decl. Att. 1, ¶¶ 2-5). Atherly filed an affidavit asserting he never received the NOV. (Atherly Decl. Att. 1, ¶¶ 2-5). Attorney Gondeiro stated that neither she nor her firm received the NOV. (Gondeiro Decl. 5CT 1374, ¶ 8.)

The County claimed it posted the Notice “near the rear entrance.” (6CT 1546:23-1547:14; 8CT 2167.) But such notice was never found by anyone at Calvary Chapel.

The County claimed it served the Notice on a person named “Perry.” But there is no one named Perry who works for Calvary Chapel. Nor did anyone deliver to Calvary Chapel the Notice, named Perry or otherwise.

In addition, the face of the Notice is Suspect. For example, it states a courtesy copy was sent to Robert Tyler but listed a different email address for Nada Higuera. In any event, neither Robert Tyler nor Nada Higuera ever received notice via email or otherwise of the Nov. 9 NOV. In any event, email service would have been improper as under California Code of Civil Procedure, email service is only permitted if the party has expressly authorized it, which was not done in this case. Cal. Code Civ. Proc., § 1010.6, subd. (a)(2)(A)(ii) (electronic service is “authorized if a party or other person has expressly consented to receive electronic service in that specific action”).

The Court erred in not recognizing this dispute of fact. As a threshold matter, Calvary Chapel presented sufficient evidence that proper notice was not given. There had already been twelve notices delivered, and all were done in the same way - via personal delivery and email delivery to Carson Atherley. So why the change? Why didn't the County bother to even get the name of the person it was delivering the NOV to? If a jury concluded that the County was deliberately avoiding proper notice to secure a tactical advantage over Calvary Chapel, then this would negate any culpability on the part of

Calvary Chapel and instead, increase the culpability of the County. In any event, giving notice of the NOV is required by law, and there is a serious factual dispute as to whether this occurred.

IV. CONCLUSION

This Court should reconsider its ruling and reverse the opinion of the trial court and the fine in this matter.

DATED: April 30, 2025

Respectfully Submitted,

/s/ Robert H. Tyler

Robert H. Tyler

Document received by the CA 6th District Court of Appeal.

CERTIFICATE OF COMPLIANCE

I, Robert H. Tyler, am counsel in this matter, and I certify that the attached Opening Brief has a typeface of 13 points or more and contains 6,157 words, as determined by a computer word count.

DATED: April 30, 2025

/s/ Robert H. Tyler
Robert H. Tyler

Document received by the CA 6th District Court of Appeal.

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

I hereby certify that on April 30, 2025, I electronically filed the foregoing with the Clerk of the Court for the California Court of Appeals, Sixth Appellate District by using the appellate CM/ECF system on.

Participants in the case who are registered TrueFiling users will be served by the appellate TrueFiling system.

In addition, I caused to be delivered via U.S. Mail addressed to:

Clerk of the Superior Court
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

Supreme Court
350 McAllister Street
San Francisco, CA 94102

DATED: April 30, 2025

/s/ Robert H. Tyler
Robert H. Tyler

Document received by the CA 6th District Court of Appeal.