

S291092

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

**CALVARY CHAPEL SAN JOSE; and MIKE MCCLURE, an
individual**

Petitioners,

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.

REPLY IN SUPPORT OF PETITION FOR REVIEW

ADVOCATES FOR FAITH & FREEDOM

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I. INTRODUCTION

This Court should grant review to correct two fatal flaws with the lower court's rulings. First, the Superior Court and Court of Appeals' opinions enforce health orders that the California Court of Appeals previously held were "void and unenforceable." *People v. Calvary Chapel San Jose*, 82 Cal. App.5th 235, 266 (2022) (*Calvary Chapel I*).

Second, the holdings below conflict with U.S. Supreme Court precedent set in *Tandon v. Newsom*, (2021) 141 S. Ct. 1294 and *Fulton v. City of Philadelphia*, (2021) 141 S. Ct. 1868. The lower courts repeat an error the Supreme Court has spent over three decades denouncing: the practice of burdening religious exercise with heavy-handed restrictions and crippling fines "that do not satisfy the threshold requirement of being neutral and generally applicable." *Id.* at 1871. By committing this error, the lower courts have forwarded one "general applicability" standard for California, while the rest of the country follows that "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions." *Id.*

Because the lower courts were without jurisdiction to enforce a voided order and because this Court must follow U.S. Supreme Court precedent, review of this matter should be granted.

II. ARGUMENT

Respondents begin their summary opposition by mischaracterizing their actions as enforcement of only "early stage" COVID-19 regulations. Answer to Petition for Review ("Resp.") at 4.

But only a few lines later, Respondents state that this case centers around their enforcement of orders from November 9, 2020, to June 21, 2021 – in other words, from 10 months to over 18 months after the COVID-19 pandemic began.¹ By that time, the County’s misguided health orders were long antiquated and knowingly unable to pass strict scrutiny review. *See also Tandon v. Newsom*, (2021) 593 U.S. 61 (striking down Santa Clara prohibitions against in home worship); *Gateway City Church v. Newsom*, (2021) 141 S.Ct. 1460 (Mem) (granting application for injunctive relief striking down Santa Clara County’s restrictions on gatherings).

Yet, Respondents persisted. Respondents persist to this day, even after the California Court of Appeals found that “the underlying orders which Calvary Chapel violated are void and unenforceable[,]” resulting in the court “anul[ling] the orders of contempt in their entirety and revers[ing] the orders to pay monetary sanctions.” *Calvary Chapel San Jose*, 82 Cal. App.5th at 266. In *Calvary Chapel I*, the Court of Appeals explained that the underlying public health orders Respondents sought to enforce were unconstitutional. *Id.* at 274-75, 279-81. Respondents in their Covid-19 enforcement actions sought to enjoin Calvary Chapel from (1) its capacity limitation, and “(2) allowing non-exempt persons to attend their indoor gatherings without face coverings, (3) allowing persons to attend their indoor gatherings without social distancing, (4) permitting singing indoors, and (5) failing

¹ “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak”, *The White House*, March 13, 2020.

to submit a Social Distancing Protocol.” *Id.* at 268. And the court held, “without deciding” the unconstitutionality of Plaintiff’s reasons (2)-(5), that it must nonetheless annul the lower court’s entire contempt order. *Id.* at 280. The public health orders, including the Social Distancing Protocol, were the underlying orders the November 2, 2020, Temporary Restraining Order (“November 2 TRO”) sought to enforce. *Id.* at 275 fn. 4. In no uncertain terms, the Court of Appeals held that the orders underlying the November 2, 2020, TRO were unconstitutional, void, and unenforceable; therefore, the contempt orders based on the TRO were annulled in their entirety. *Id.* at 266, 280.

Nevertheless, Respondents are still basing its hunt for Calvary Chapel’s pound of flesh on the void November 2 TRO. Respondents have issued daily fines, which the lower courts upheld, based upon Calvary Chapel’s abstention from signing a certificate of compliance required by the November 9, 2020, Notice of Violation (“November 9 NOV”), which on its face required Calvary Chapel to agree to comply with the void November 2 TRO. As pointed out in the Petition for Review, since the County cannot prove violations occurred for each day a fine was levied, the County was left to argue that it did not need to witness or investigate each daily violation because the violation by Calvary Chapel was the ongoing failure to submit a compliance letter as required by the November 9 NOV. (Pet. for Rev. pp 20-21, 24-25, 38-42.)

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² “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak”, *The White House*, March 13, 2020.

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Instead of addressing the substance of this argument, Respondents claim, without explanation, without a citation to the

factual record, and without presenting any legal authority, that Petitioners waive this argument.³ They did not.

A. Calvary Chapel Could Not Waive this Argument Because It is Unwaivable as a Matter of Law.

A void order or judgment may be directly or collaterally attacked at any time. *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660 (*American Contractors*); *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228. This Court retains the inherent power to vacate void orders. *American Contractors*, at 660; *Gorham*, at 128; *see also Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 15; *Doe v. Regents of Univ. of California*, (2022) 80 Cal. App. 5th 282, 292.

On August 15, 2022, the Court of Appeals found that the lower court acted outside of its jurisdiction by holding Calvary Chapel in contempt for violating an unconstitutional order. *Calvary Chapel San Jose*, 82 Cal. App.5th at 279-280. The court characterized the November 2 TRO as “void and unenforceable.” *Id.* at 266. Importantly, the November 9 NOV specifically required Calvary Chapel to submit a compliance statement that it would comply with the public health orders and the underlying November 2 TRO.

After that ruling, Respondents continued to seek enforcement of their daily fines based on the November 9 NOV that expressly demanded compliance with, among numerous health orders, the void

³*See* Cal.Rules of Court, Rule 204; *Wentworth v. Regents of University of California*, (2024) 105 Cal.App.5th 580; *United Grand Corp. v. Malibu Hillbillies, LLC*, (2019) 36 Cal.App.5th 142 (explaining that when a party fails to cite proper authority in a brief, the court is free to disregard the party’s unsupported contentions).

November 2 TRO. Although the County is seeking fines for daily violations from August 2020 through May 2021, they did not personally witness these violations. The November 9 NOV is the only applicable notice of violation in this matter. *See* Opinion 6. In fact, the opinion below does not cite any notice of violation after the November 9 NOV. Thus, all fines imposed in this case after November 9, 2020, are based on Calvary Chapel’s refusal to agree to comply with the unconstitutional November 2 TRO. Nothing short of agreeing in writing to compliance with a void court order would have eliminated the continuing daily fines. The gravity of this case is that the trial court and Court of Appeals in *Calvary II* sustained over \$1.2 million in fines against Calvary Chapel under the November 9 NOV, which required compliance with underlying unconstitutional conditions.

But no court, including the lower courts, has the power to enforce an order that has been nullified and held to be “void and unenforceable.” *Id.* at 266; *see also Peralta v. Heights Medical Center* (1988) 485 U.S. 80, 84; *Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 732–733. And when the order has been voided, it “is for all purposes a nullity—past, present and future.” *Id.* Therefore, Calvary Chapel cannot be subjected to enforcement of the November 9 NOV when it enforces a nullified, void, and unconstitutional TRO that underlies the NOV. And the lower courts acted outside of their authority and jurisdiction in holding that Calvary Chapel face crippling monetary fines for failure to comply with the void order.

This appeal, *Calvary Chapel II*, should be consistent with *Calvary Chapel I* where in the Court of Appeals stated, “[o]ur analysis

is governed by the well-established rule that ‘an order unconstitutional on its face *is* in excess of jurisdiction and cannot sustain a contempt judgment.’” *Id.* at 279 citing *People v. Gonzalez* (1996) 12 Cal. 4th 804, 823. Likewise, the Court of Appeals in *Calvary Chapel II* lacked jurisdiction to enforce the County’s fines where those fines are based on the same underlying orders (the November 2 TRO and public health orders) held unconstitutional when the Court of Appeals reversed the contempt sanctions and fines in *Calvary Chapel I*.

B. The Unconstitutionality of the November 2 TRO Has Continually Been an Issue in this Case and was Not Waived.

The unconstitutionality of the November 2 TRO was presented below, argued by both sides, and in fact, was recognized by the lower court in its decision. In Petitioner’s opening brief below, Petitioners noted that the December 17, 2020, and February 16, 2021, contempt orders had been overturned as unconstitutional. Petitioners’ Opening Br., at 9. And in response to the Respondents’ argument that Calvary Chapel failed to submit a compliance statement, Calvary Chapel argued that it could not comply with November 9 NOV because it subjected Petitioners to “unconstitutional conditions.” Dec. 6 Reply Brief, at 20-21.

Respondents argue that Calvary Church “refused to submit an SDP” citing SSUMF No. 29. (Response, p. 15). This is misleading. The mandatory online portal required that a party verify that it would take specific steps in order to submit an SDP, including that the party would require masking on the premises among other unconstitutional conditions, such as capacity restrictions. (5CT 1374-75.) Calvary Church was, therefore, unable to submit the SDP through an online portal because it was unable to modify the document online. (*Id.*) Instead, it made good faith efforts to create and return an SDP involving the steps it

was willing to take, but the County would not allow or accept modifications. (*Id.*)⁴

Appellants' Reply Brief, at 20-21.

Petitioners argued that in order to comply with the November 9th NOV, Petitioners were required to verify that it was complying with the unconstitutional conditions. *Id.* at 21. Petitioners gave the example that, in order to submit the SDP, Petitioners were required to verify, signed and in writing, that it was complying with the capacity restrictions which were found unconstitutional in *Calvary Chapel San Jose*, 298 Cal.Rptr.3d 262. *Id.* The SDP was just one of the Public Health Orders the November 2 TRO sought to enforce against Calvary Chapel. Accordingly, the issue was clearly raised during briefing that the Court's order required Petitioners to comply with unconstitutional conditions.

This argument was further sustained and developed at oral argument. Recording of Oral Argument at 20:30, *The People of the State of California v. Calvary Chapel San Jose*, Case No. H051860, April 10, 2025, https://jcc.granicus.com/player/clip/5728?view_id=36&redirect=true ("Recording"). At oral argument, Calvary Chapel argued that it was required to comply with the public health order and the November 2 TRO which was previously determined to be void. Thus, Petitioners argued, they were required to comply with "the

⁴ SDP refers to a written Social Distancing Protocol. It was a form within the Public Health Orders required to be submitted by Calvary Chapel and all businesses. *Calvary Chapel San Jose*, 82 Cal. App.5th at 265. The SDP required compliance with all Public Health Orders, including unconstitutional capacity restrictions. The November 2 TRO was unconstitutional in that it required submission of the SDP wherein Calvary Chapel had to agree to underlying unconstitutional capacity restrictions. *Calvary Chapel San Jose*, 82 Cal. App.5th at 279-280.

entirety of the November 2nd TRO. And that TRO is void.” Recording, at 21:30.

The lower court referenced this argument in its opinion. The court noted that it had in fact previously annulled prior contempt orders and reversed the orders to pay monetary sanctions because the underlying orders were “facially unconstitutional.” Opinion, at 9.

In addition, Petitioners raised these issues in its Petition for Panel Rehearing. Calvary Chapel pointed out the inconsistencies in the court’s opinion when the court simultaneously noted that the November 2 TRO was unconstitutional and then enforced fines premised on failure to comply with the unconstitutional order. Calvary Chapel argued that, under the Law of the Case doctrine, the November 2nd TRO was unconstitutional. Petition for Rehearing, at 12. Accordingly, the Court’s order punishing Petitioners for violating the TRO imposed an unconstitutional condition on Petitioners. *Id.* 12-18. Specifically, Petitioners argued that “Because the November 2 TRO was unconstitutional, it made compliance with the November 9 NOV an unconstitutional condition to avoiding the fine.” *Id.* at 16. Thus, this issue was fairly presented and argued below.

C. Supreme Court Precedent Requires This Court Grant Leave.

This Court has the authority to review an order of the Court of Appeals “[w]hen necessary to secure uniformity of decision[.]” Cal. R. Ct. 8.500. Here, the lower courts decisions and dismissal of Petitioners’

First Amendment arguments, conflict with the U.S. Supreme Court’s decisions in cases like *Tandon* and *Fulton*.⁵

In *Tandon*, the Ninth Circuit Court held that private religious gatherings are not comparable “in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings.” *Tandon v. Newsom*, (9th Cir. 2021) 992 F.3d 916, 920, disapproved in later proceedings, 141 S. Ct. 1294 (2021). The Supreme Court, however, swiftly reversed the Ninth Circuit’s flawed reasoning, issuing a clear directive: “**This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California’s COVID restrictions on religious exercise.**” *Tandon*, 141 S. Ct. at 1298 (emphasis added).

Review should be granted so California can avoid the sixth time. The court’s opinion below violates Supreme Court free exercise jurisprudence by (1) placing the burden on the church to prove that granting it an exemption would present a *lessor* risk than the other permitted exemptions, and (2) requiring evidence that the state has granted individualized exemptions when the law on its face permits the state to grant individualized exemptions.

In analyzing free exercise claims, a critical factor is whether the law in question was neutral and/or generally applicable. If it isn’t neutral and generally applicable, then strict scrutiny applies, and the

⁵On federal questions, the decisions of the California Supreme Court must follow the United States Supreme Court when it has decided the same question. See *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 507; *Winns v. Postmates Inc.*, (2021) 66 Cal. App. 5th 803, 811.

law will likely fail as applied against religious exercise. *See Church of Lukumi Babalu Aye*, (1993) 508 U.S. 520, 546.

In determining whether a law is neutral and generally applicable, an oft-dispositive factor is whether the government applies the law equally to comparable secular 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.” Similarly, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 29, Justice Kavanaugh 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.” (Kavanaugh, J., concurring.)

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 public health orders provided for myriad of exemptions, including construction sites, personal care services, receiving facial tattoos, having one’s makeup done, eating at restaurants, drinking at bars and wineries, youth programs, and athletes competing in sports like basketball, football, and wrestling. *See* 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.

Thus, the burden is not on Calvary Chapel to prove that the secular activities are comparable to the church activities in relation to

the interest at play (public safety from a virus). Rather, the burden is on the County to prove that allowing a religious exemption is more dangerous than the permitted exemptions. By placing the burden on Calvary Chapel, the court erred. Rather, the burden should have been placed on the government to prove that granting Calvary Chapel an exemption would present a greater risk than the risks associated with all of the other permitted exemptions. Because this burden was never placed on the Respondents, the decision below is in error.

In addition, a law is not neutral or generally applicable if it allows individualized exemptions. The lower court's decision conflicts with *Fulton v. City of Philadelphia*, (2021) 141 S. Ct. 1868, in this regard. In *Fulton*, the Supreme Court held that Philadelphia's refusal to contract with Catholic Social Services for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. The Court noted, "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* at 1871 (internal quotations and punctuation omitted).

The focus here is on "invites". It doesn't matter if exceptions are given. 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." *Id.* at 1879.

Here is the critical point that the lower court failed to apprehend: once the government creates a mechanism permitting individualized exemptions, the law is no longer generally applicable. *Fulton*, 141 S.Ct. at 1871. The issue is not whether there is evidence that such exemptions were granted, but whether the law permits individualized assessments.

The various public health orders involved in this case permitted individualized assessments for granting exemptions. The Urgency Ordinance, which the lower court relied on to enforce its fines against Calvary Chapel, 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 and their private contractors 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.

Despite the evidence that government officials were “invited” to assess when exemptions should be given, the court below then concluded that the law was generally applicable as there was no evidence that such a system existed. Opinion, at 31. But the proof of existence is the policy itself.

III. CONCLUSION

Review should be granted to align California law with established Supreme Court jurisprudence on these issues and to prevent

a manifest injustice of imposing a \$1.2 million dollar fine against a church and its pastor for failure to comply with an unconstitutional order.

Dated: June 26, 2025

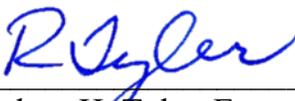
Respectfully submitted,



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CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this brief, certify that the above document contains 3,696 words.



Robert H. Tyler, Esq.
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CERTIFICATE OF SERVICE

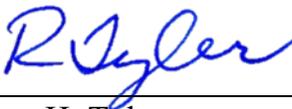
I am an employee in the County of Riverside. I am over the age of 18 years and not a party to the within entitled action; my business address is 25026 Las Brisas Road, Murrieta, California 92562.

On June 26, 2025, I served a copy of the following document(s) described as:

REPLY IN SUPPORT OF PETITION FOR REVIEW

on the interested party(ies) in this action by-email or electronic service [C.C.P. § 1010.6; CRC 2.250-2.261]. The documents listed above were transmitted via e-mail to the e-mail addresses on the attached service list.

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.



Robert H. Tyler

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