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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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 1-501-50, inclusive, Defendants.	Case No.: 20CV372285 **DEFENDANTS' NOTICE OF DEMURRER AND DEMURRER TO THE FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: TBD Time: TBD Dept.: D12

TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on _____, 2021, or as soon as the matter may be heard in Department D12 of the above-referenced court, located at 191 North Street, San Jose, California 95113, Calvary Chapel San Jose and Mike McClure (collectively, "Defendants") will move for an order sustaining their demurrer for failure to state a cause of action, without leave to amend, to Counts I, II, III, IV, and V. Cal. Civ. Proc. Code § 430.10(e).

This Demurrer is made pursuant to California Civil Procedure Code § 430.10 and is based upon the Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities in Support Thereof, the Declaration of Mariah Gondeiro, the Request for Judicial Notice, the pleadings and

other papers on file in this action, and upon such other matters as may be relevant and which properly may be adduced at the hearing on this matter.

DEMURRER

The Defendants demurrer to Plaintiffs' First Amended Complaint on the following grounds:

DEMURRER TO FIRST CAUSE OF ACTION

The first cause of action does not state facts upon which relief could be granted because the public health orders are unconstitutional. (Code Civ. Proc., $ 430.10, subd. (e).)

DEMURRER TO SECOND CAUSE OF ACTION

The second cause of action does not state facts upon which relief could be granted. Plaintiffs cannot demonstrate the Defendants' church gatherings caused unreasonable and substantial harm to a considerable number of people at the same time. (Code Civ. Proc., $ 430.10, subd. (e).)

DEMURRER TO THIRD CAUSE OF ACTION

The third cause of action does not state facts upon which relief could be granted because the public health orders are unconstitutional. (Code Civ. Proc., $ 430.10, subd. (e).)

DEMURRER TO FOURTH CAUSE OF ACTION

The fourth cause of action does not state facts upon which relief could be granted because Urgency Ordinance No. NS-9.21 and the fines authorized thereby are unconstitutional. (Code Civ. Proc., $ 430.10, subd. (e).)

DEMURRER TO FIFTH CAUSE OF ACTION

The fifth cause of action does not state facts upon which relief could be granted because Urgency Ordinance No. NS-9.21 and the fines authorized thereby are unconstitutional. (Code Civ. Proc., $ 430.10, subd. (e).)

DATED: August 31, 2021

TYLER & BURSCH, LLP

By: s/ Mariah Gondeiro
Mariah Gondeiro, Esq.
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In October 2020, the Plaintiffs filed a complaint for injunctive relief against Defendants Calvary Chapel San Jose and Mike McClure (collectively, Defendants), claiming their indoor church gatherings posed a significant risk of COVID-19 transmission. (Complaint for Injunctive Relief, on file.) Plaintiffs sought to enjoin the Defendants for violating the State and County public health orders, which imposed draconian and arbitrary restrictions on Defendants' religious practices. (*Id.* ¶¶ 75-87.) However, the Supreme Court has since made clear that California's restrictions on indoor worship services violate the Free Exercise Clause and strict scrutiny applies to all provisions of the Plaintiffs' public health orders. (*See, e.g., Harvest Rock Church v. Newsom* (2020) 141 S.Ct. 889; *South Bay Pentecostal Church, v. Newsom* (2021) 141 S.Ct. 716 ["South Bay"]; *Gish v. Newsom* (2021) 141 S.Ct. 1290; *Gateway City Church v. Newsom* (2021) 141 S.Ct. 1460; *Tandon v. Newsom* (2021) 141 S.Ct. 1294.) Despite this vindication and despite the fact that Plaintiffs have not linked one COVID-19 case to the Defendants' church gatherings, they have the gall to amend their Complaint to add a public nuisance claim and asks this Court to enforce $2,868,616.67 in fines against Defendants for violating unconstitutional public health orders. (First Amended Complaint for Injunctive Relief and to Recover Administrative Fines [FAC] at ¶¶ 108-110, on file.) Giving credence to Plaintiffs' allegations under these circumstances would be improper. Therefore, the Defendants respectfully request the Court dismiss Counts I, III, IV, and V because the public health orders are unconstitutional and cannot form the basis of any fines. The Defendants also request the Court dismiss Count II because, among other reasons, the Plaintiffs cannot establish a causal link between the Defendants' church services and any harm sufficient to constitute a public nuisance.

II. STATEMENT OF FACTS

A. The State and Santa Clara County Public Health Orders

On July 29, 2020, the California Department of Public Health (CDPH) issued guidance for places of worship which required they refrain from singing and chanting. (FAC ¶ 39.) The singing and chanting ban did not apply to Hollywood. (*See South Bay, supra,* 141 S.Ct. at pp. 718-720.) On August 28, 2020, the CDPH issued an order that set forth a procedure for assigning counties to one

of four tiers known as the Blueprint for a Safer Economy ("Blueprint"). (Defendants' Request for Judicial Notice [RJN] at Ex. A.)

On October 14, 2020, the County issued a Revised Risk Reduction Order superseding the previous Risk Reduction Order. (FAC ¶ 30.) The Revised Order required all persons to submit a COVID-19 protection plan called a Social Distancing Protocol. (*Id.* ¶ 31.) The Order defined a "gathering" as "any indoor or outdoor event, assembly, meeting, or convening that brings together people from separate households in a coordinated fashion…" (RJN, Ex. B., at p. 10.) A "gathering" did not apply to "childcare settings or preschool, kindergarten, elementary, secondary, or higher education classrooms; areas where people may be in transit, or settings in which people are in the same general space at the same time but engaged in separate activities" such as offices, stores, and restaurants. (*Id.*) The Order also established a significant and glaring exemption:

> All individuals, businesses, and other entities in the County are ordered to comply with the applicable provisions of this Order …. Governmental entities must follow the requirements of this Order applicable to businesses, but governmental entities and their contractors are not required to follow these requirements to the extent that such requirements would impede or interfere with an essential government function, as determined by the governmental entity, unless otherwise specifically directed in this Order or by the Health Officer.

(*Id.,* at p. 6.)

On November 16, 2020, the CDPH issued an updated Guidance for the Use of Face Coverings ("Face Covering Guidance"), which the County incorporated into their Revised Risk Reduction Order. (*Id.*, at p. 12.) The Face Covering Guidance required everyone wear a mask and maintain six feet of social distancing. (RJN, Ex. C.) The Guidance exempted certain people such as people with a medical condition or disability, people actively eating and drinking, and persons for whom wearing a face covering would create a risk to the person related to their work. (*Id*., at p. 2.) Hollywood was encouraged but not required to follow COVID-19 guidelines. (RJN, Ex. D.)

On February 5, 2021, the Supreme Court enjoined the Blueprint's prohibition on indoor gatherings. (*See South Bay, supra,* 141 S. Ct.) On April 9, 2021, the Supreme Court enjoined California's restrictions on at-home religious gatherings. (*See Tandon v. Newsom* (2021) 141 S. Ct.

1294.) The CDPH again updated the Blueprint to make capacity limits on houses of worship "strongly recommended" instead of mandatory. (FAC ¶ 46.)

B. Defendants' Administrative Fines

On August 11, 2020, the County Board of Supervisors adopted Urgency Ordinance No. NS-9.921 ("Urgency Ordinance"), which authorizes County enforcement officers to issue fines against entities and individuals who violate the State and County public health orders. (FAC at ¶¶ 49-51.) The maximum daily fines for commercial activities and non-commercial activities are $5,000 and $500, respectively. (RJN, Ex. E.) The County considers Calvary Chapel San Jose ("Church") a commercial entity. (FAC at ¶ 51.)

To date, Defendants have accrued $3,911,750 in fines. (FAC ¶ 99.) $1,327,750 of those fines are based upon the Defendants failure to submit a Social Distancing Protocol between August 23, 2020 to May 18, 2021. (*Id.*) $350,000 of the total fines represent Defendants "unlawful gatherings" between August 23, 2020 to March 28, 2021. (*Id.*) The County fined Defendants $2,234,000 for failing to enforce face coverings on congregants and personnel from November 9, 2020 to June 21, 2021. (*Id.*) The County exercised its "prosecutorial discretion" and reduced the fines to $2,868,616.67. (FAC ¶¶ 100, 106.)

III. ARGUMENT

In ruling on a demurrer, a trial court should consider, based upon all the facts alleged, whether "the plaintiff is entitled to any relief at the hands of the court against the defendants." (*Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1152.) A demurrer should be sustained without leave to amend if the plaintiff does not show "a reasonable possibility to cure any defect by amendment" or "that the pleading liberally construed can state a cause of action." (*Id.*) While the allegations of the complaint must be treated as having been admitted, this applies only to well-pleaded allegations. (*Consumer Cause, Inc. v. Weider Nutrition International, Inc.* (2001) 92 Cal.App.4th 363, 366.) A court need not accept as true a plaintiff's contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

The Court should dismiss with prejudice **Counts I and III** for failure to state a claim because

the public health orders violate the Free Exercise Clause. The Court should dismiss **Counts IV and V** for failure to state a claim because the fines levied against the Defendants are unconstitutional for three separate reasons. First, the fines are predicated upon public health orders that violate the First Amendment. The Supreme Court has already held that the requirement to refrain from holding indoor gatherings at churches violates the Free Exercise Clause. The social distancing requirement, mask mandate, and singing and chanting ban also violate the Free Exercise Clause because the State and County granted special exemptions to various entities and activities without justification. The fines based upon Defendants' failure to submit a Social Distancing Protocol violate the First Amendment because they require Defendants agree to unconstitutional conditions.

Second, the Plaintiffs are not entitled to any fines because the Urgency Ordinance is unconstitutionally vague. Third, the excessive fines levied against the Defendants violate the Eighth Amendment. Even on the basis of just one of these, this Court should dismiss **Counts IV and V.**

Finally, the Court should dismiss **Count II** for failure to state a claim. Plaintiffs cannot demonstrate the Defendants' church gatherings caused unreasonable and substantial harm to a considerable number of people at the same time.

A. The Urgency Ordinance and Fines Authorized Thereby are Predicated on Unconstitutional Public Health Orders.

1. California's and Santa Clara County's Restrictions on Indoor Gatherings at Churches are Unequivocally Unconstitutional.

On November 25, 2020, the U.S. Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2021) 141 S. Ct. 63 ("Brooklyn Diocese") (per curiam) enjoined New York's COVID-19 tier-based Cluster Action Initiative that subjected churches to harsher capacity restrictions than secular entities and activities. Since *Brooklyn Diocese*, the Supreme Court has been very consistent on this point such that every application for injunction relief has resulted in the vacatur of lower court opinions denying injunctive relief. (*See, e.g., Harvest Rock Church, supra,* 141 S.Ct.; *Robinson v. Murphy* (2020) 141 S.Ct. 972; *High Plains Harvest Church, supra,* 141 S.Ct..) The Ninth Circuit has also recognized the "seismic shift" brought by *Brooklyn Diocese*. (*See, e.g., South*

Bay Pentecostal Church v. Newsom (9th Cir. 2020) 981 F.3d 765; *Calvary Chapel Dayton Valley v. Sisolak* (9th Cir. 2020) 982 F.3d 1228.)

On February 5, 2021, the Supreme Court enjoined the Blueprint's prohibition on indoor gatherings, sounding a deathknell on discriminatory COVID-19 restrictions on indoor gatherings. (*See South Bay, supra,* 141 S. Ct.) Summarizing the State's argument, Justice Gorsuch writes, "The State offers essentially four reasons" why indoor services were closed under Tier One of the Blueprint, namely that "religious exercises involve (1) large numbers of people mixing from different households; (2) in close physical proximity, (3) for extended periods; (4) with singing." (*Id.* at p. 718.) However, the Supreme Court, in holding the orders were not narrowly tailored, noted these same activities could and do occur at entities and during activities that were allowed to meet at 25% capacity. The Court determined that California's rules and reasoning for the many entities and activities allowed at 25% capacity were not narrowly tailored. (*Id.* at p. 717 ["When a State [California] so obviously targets religion for differential treatment, our job becomes that much clearer."].)

Despite this precedent, Santa Clara County claimed their orders were neutral and continued to enforce their complete ban on indoor gatherings. On March 30, 2021, the Supreme Court admonished the County, holding "[t]his outcome is clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom.*" (*Gateway, supra,* 141 S.Ct.) The Supreme Court has been explicit. The State and County's restrictions on indoor gatherings at churches "clearly" violate the Free Exercise Clause of the First Amendment. (*Id.*) Thus, the Court should dismiss with prejudice Counts I, III, IV, and V because the public health orders relating to capacity restrictions are unconstitutional and cannot provide the foundation of any fines.

2. The Singing and Chanting Ban, Social Distancing Requirement, and Mask Mandate Also Violate the Free Exercise Clause.

The orders relating to singing and chanting, social distancing, and masks fall into the categories of laws that subtly violates the Free Exercise Clause by placing certain categories of secular activities and entities in a favored class, while placing religious activities or institutions in a less favored category. (*See Church of Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520,

537.) "When a state begins exempting secular entities from an otherwise generally applicable regulation, it can only decline to exempt religious activities if it has a 'compelling reason' and thus satisfies strict scrutiny." (*Emp. Div., Dep't of Hum. Res. of Oregon v. Smith* (1990) 494 U.S. 872, 884.) *Denver Bible Church v. Azar* (2020) 494 F.Supp.3d 816 is instructive. Therein, the court found that while Public Health Order 20-35 designated houses of worship as "critical," in application, it treated houses of worship differently from other "critical" businesses and activities. (*Id.* at p. 831.) For instance, the face-mask mandate which was seemingly neutral on its face granted various exemptions to individuals seated at a food service establishment, individuals receiving a personal service, and individuals whose job required they remove their face covering to perform a "necessary" part of their activity. (*Id.* at p. 833.)

Like Colorado, the Plaintiffs, by way of the Face Covering Guidance, allowed groups to share a meal at a restaurant, presumably talking and laughing, and even shouting and singing, all while seated facing one another, in an intimate setting within six feet of each other, and frequently removing their mask or going without a mask. (RJN, Ex. C.) Further, the County's Risk Reduction Order expressly exempted government entities and their contractors from social distancing, wearing masks, or any other restriction "to the extent that such requirements would impede or interfere with an essential government function…." (*Id*., Ex. B., at p. 6.) Most notoriously, California allowed individuals to sing and chant without a mask in Hollywood studios. (*Id*., Ex. D., at p. 6.) No such exemption was provided to houses of worship. Because the State and County created exceptions for secular activities as it deemed necessary, they were "obligated to treat religious activities no less favorably, absent a compelling reason." (*Azar, supra*, 494 F.Supp.3d at p. 833.)

When, as here, Free Exercise neutrality fails, "[t]he compelling interest standard that [courts] apply … is not 'water[ed]…down' but 'really means what it says.'" (*Lukumi, supra,* 508 U.S. at p. 546.) As explained in *South Bay*, this means the State and County must show why their orders are necessary. (*South Bay, supra,* 141 S.Ct. at p. 716.) This is accomplished by "demonstrat[ing] clearly that nothing short of those measures will reduce the community spread of COVID-19 at indoor religious gatherings to the same extent as the restrictions the State enforces with respect to other activities it classifies as essential." (*Id*.) And, arguably, a successful showing must be particularized

to the public health interests of California and Santa Clara County, and specifically demonstrate how and why these interests demand more severe interventions than "the vast majority of States and the Federal Government" that have employed a less restrictive approach. (*Holt v. Hobbs* (2015) 574 U.S. 352, 368.)

Plaintiffs will likely proffer the same-old argument that churches are inherently more dangerous, but the Supreme Court has rejected this flawed hypothesis. This argument was made by the state in *Brooklyn Diocese* and relied upon by the dissenting justices. (*See, e.g., Brooklyn Diocese, supra*, 141 S.Ct. at p. 78 [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 p. 79 [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].) California recycled the same arguments in *South Bay*, but their experts did not convince a majority on the Court. (*South Bay, supra*, 141 S. Ct. at pp. 717-18.)

Plaintiffs cannot show that churches in Santa Clara County are more dangerous than restaurants or activities the County and State deem essential. The Plaintiffs cannot explain how eating, laughing, talking, or singing without masks inside a restaurant or at a Hollywood studio poses less grave a threat than sitting, talking, or singing inside of a church. The State and County have simply decided that the risk of allowing various activities to be exempt from the Face Covering Guidance and Revised Risk Reduction Order is justified on the basis that those activities are essential. "But the People, through the Constitution, have resolved that the free exercise of religion is at least as critical and necessary." (*Azar, supra*, 494 F.Supp.3d at p. 837.) Accordingly, the Court should dismiss I, III, IV, and V for failure to state a claim because the orders relating to singing and chanting, social distancing, and masks are unconstitutional and cannot form the basis of any fines.

3. The Social Distancing Protocol Requires Defendants Agree to Unconstitutional Conditions and Cannot Form the Basis of Any Fines.

Finally, the Court should dismiss Counts IV and V because portions of the fines levied by the County required Defendants agree to unconstitutional conditions. The unconstitutional

condition's doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1159; citing *Koontz v. St. Johns River Water Management Dist*. (2013) 570 U.S. 595, 604.) Under the unconstitutional condition's doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right." (*Koontz v. St. Johns River Water Management Dist.* (2013) 133 S.Ct. 2586, 2594 (internal quotation and citation omitted).) The doctrine "limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." (*See United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 866; *Keyishian v. Board of Regents of Univ. of State of N.Y.* (1967) 385 U.S. 589 (*O'Hare Truck Service, Inc. v. City of Northlake* (1996) 518 U.S. 712, 721.) For example, in *Perry v. Sindermann* (1972), 408 U. S. 593, the Supreme Court held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration.

The Plaintiffs have fined Defendants $1,327,750 for their failure to submit a Social Distancing Protocol. (FAC ¶ 32.) The County's form required Defendants to "attest that they would comply with any applicable industry-specific directives or guidance issued by the County or State." (FAC at ¶ 32.) In other words, the Defendants were required to choose between assenting to unconstitutional requirements like the capacity restrictions or face daily fines up to $5,000. This type of coercion is worse than the example provided in *Perry* because there, the government at least provided a benefit (e.g. employment contract) in exchange of plaintiff waiving his constitutional rights. Here, the government did not offer any benefit to the Church but instead threatened them with crippling fines if they did not sign the Social Distancing Protocol. This is clearly unconstitutional coercion, and the County is not entitled to these fines. (*Koontz, supra,* 70 U.S. at p. 604). Thus, this Court should dismiss Counts IV and V.

B. The Plaintiffs are Not Entitled to the Fines Because the Urgency Ordinance is Unconstitutionally Vague.

Moreover, the Court should dismiss Counts IV and V because the fines derive from an unconstitutionally vague ordinance. "It is a basic principle of due process [under the 14th

Amendment] that an enactment is void for vagueness if its prohibitions are not clearly defined." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) Laws must give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Id*.) A vague law both "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis" thereby granting unfettered discretion. (*Id.* at pp. 108-109 (quoting *Baggett v. Bullitt* (1964) 377 U.S. 360, 372 (1964); *see also Hampsmire v. City of Santa Cruz* (N.D. Cal 2012) 899 F. Supp. 2d 922.)

Section 6(c)(3) allows an Enforcement Officer to consider when assessing fines arising from a commercial activity, "whether the violation is likely to result in increased revenue or avoided costs." A reasonable person would construe this language to extend to ordinary commercial entities that are engaged in buying and selling goods and/or services. This is especially true when Section 6(c)(3) uses the words "revenue" and "costs" in the same sentence, terms that are associated with entities operating to earn a profit. (*See Vilardo v. County of Sacramento* (1942) 54 Cal.App.2d 413, 420 ["[U]nder the rule of noscitur a sociis the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used."].)

A reasonable person would especially become confused by the definitions in the Urgency Ordinance when surrounding counties in the region define a commercial entity as the term is commonly understood. For example, San Mateo County defines a commercial entity as one that "furnishes goods or services to the general public for profit." (*Id.*, Ex. F, at p. 8.) Like San Mateo County, Sonoma County defines a commercial entity as one that engages in activity for profit. (*Id.*, Ex. G, at p. 9.) Thus, the comparison between Santa Clara and other California counties further reveals how the unbecoming wordsmanship in Section 6(c)(3) is unconstitutionally vague.

Plaintiffs will likely contend Section 6(c)(3) extends to the Church by relying on their expansive definitions of "Businesses" and "Commercial Activity" contained in Sections 2(b) and 6(b)(ii) of the Urgency Ordinance. Section 6(b)(ii) defines a "commercial activity" as "any activity associated with a Business or with a commercial transaction." In Section 2(b), a business is defined as "any for-profit, non-profit, or educational entity, whether a corporate entity, organization, partnership, or sole proprietorship, and regardless of the nature of the service, the function it

performs, or its corporate or entity structure." These expansive definitions, combined, allow the government to essentially fine any entity as a commercial activity. The only exception is for non-commercial activities, which are defined as violations not associated with a business or with a commercial transaction. (*See* § 6(b)(i).) This exception, however, is an illusion because the Ordinance's vague and all-encompassing definition of a commercial activity leaves no entity or action from its reach. Thus, no person of ordinary intelligence can know whether their conduct is deemed unlawful commercial activity.

Surely, the Plaintiffs would not suggest to the Court that essentially all entities—no matter their conduct—are commercial in nature. The Ordinance, however, allows government officials to rely on their subjective whims to determine what violations qualify as either commercial or non-commercial. Such unfettered discretion is unconstitutional. (*See Baggett, supra,* 377 U.S. at p. 372.) For the foregoing reasons, the Court should dismiss Counts IV and V because the fines originate from an unconstitutionally vague ordinance.

C. The Plaintiffs Are Not Entitled to the Fines Because They Are Unconstitutionally Excessive Under the Eight Amendment.

The right to be free from excessive monetary penalties is "fundamental to the American scheme of justice," *Duncan v. Louisiana* (1968) 391 U.S. 145, 149, and lies squarely at the heart of the liberty and property interests protected by the Fourteenth Amendment. (*See also McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 764.) The deep historical roots of the right are well-established; the Court has already recognized that the Excessive Fines Clause traces back to the Magna Carta. (*See United States v. Bajakajian* (1998) 524 U.S. 321, 335; *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257.)

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Importantly, here, the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." (*Austin v. United States* (1993) 509 U.S. 602, 609–610.) Moreover, it applies to civil and criminal penalties alike. (*Timbs v. Indiana* (2019), 139 S.Ct. 682, 686); *Austin, supra,* 509 U.S. at p. 610.)

A fine violates the Eighth Amendment if it "is grossly disproportional to the gravity of the defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) The Supreme Court has identified several factors that should be considered in weighing the gravity of an offense: (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. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal. 4th 707, 728, citing *Bajakajian, supra,* 524 U.S. at pp. 337-338.) "Bajakajian does not mandate the consideration of any rigid set of factors." (*United States v. Mackby* (9th Cir. 2003) 339 F.3d 1013, 1016.)

Regarding the Defendants' culpability, Plaintiffs will likely argue that the Defendants' serial violations of the public health orders justify the exorbitant fines. But the analysis does not start and end there. There is no evidence that the Defendants' church gatherings contributed to any known COVID-19 case. More importantly, Defendants were acting in good faith to assert their first Amendment rights and were informed by the decisions of the United States Supreme Court affirming their right to gather and worship. (*See Infra*, at pp. 4-8.)

Turning to the second prong, again, the FAC fails to allege any evidence of harm. The Defendants were not breaking the law. Rather, the public health orders and the fines enforced pursuant thereto violate the First Amendment. (*Id.*) Further, Defendants' indoor gatherings did not contribute to any known COVID-19 cases. Indeed, the Plaintiffs even concede that the true cost of Defendants' defiance will likely never be known. (FAC ¶ 10.) However, the Plaintiffs implore the Court that the Defendants must be held accountable for "their blatant disregard of the public health orders" and "willingness to endanger the health and lives of their congregation, friends and families of congregants, and the wider community." (*Id.*) It is irrelevant how Plaintiffs view Defendants' church gatherings and that they believe the Court should hold Defendants accountable for hypothetical harm. What is relevant is that after numerous depositions and almost a year of litigation, the Plaintiffs cannot trace one COVID-19 case to Defendants' church gatherings.

Furthermore, Santa Clara County's fines against the church far exceed the maximum amount of fines levied against other non-commercial entities in surrounding counties. For instance, Contra Costa County's COVID-19 ordinance authorizes up to $1,000 a day in fines against commercial

activities and $500 a day against non-commercial activities. (RJN, Ex. H, at p. 4.) San Mateo County's ordinance authorizes up to $500 in daily fines against non-commercial entities and $3,000 in daily fines against commercial entities. (*Id.,* Ex. F, at p. 9.) Sonoma County levies up to $10,000 in fines against commercial entities but only assesses $100 in daily fines against non-commercial entities. (*Id.,* Ex. G, at p. 11.)

The Plaintiffs could have assessed the maximum $500 daily fine against the Defendants, which applies to non-commercial activities. (*Id.,* Ex. E, at p. 12.) Instead, the Plaintiffs classified the Church as a commercial activity so they could assess the maximum $5,000 daily fine against the Defendants. Enforcing 2.8 million dollars against a harmless church under the classification of a commercial activity would be fundamentally improper and an outrageous miscarriage of justice. The Eighth Amendment is another reason this Court should dismiss Counts IV and V with prejudice.

D. The Plaintiffs Have Failed to Plead its Second Cause of Action for Public Nuisance.

Public nuisances are offenses against, or interferences with, the exercise of rights common to the public. Cal Civ Code § 3480. The interference must be both substantial and unreasonable. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521). "Practically all human activities unless carried out in a wilderness interfere to some extent with others or involve some risk of interference…. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 14 Cal.4th 893, 937, quoting Rest.2d Torts, § 822, com. g, p. 112.)

"Substantial interference requires proof of significant harm; a real and appreciable invasion of the plaintiff's interests that is definitely offensive, seriously annoying, or intolerable. The measure is an objective one; if normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105 [citing Restatement (Second) of Torts § 821F, comments c, d].) "The primary test for determining whether conduct is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." (*San Diego Gas & Elec. Co. v. Superior Ct.* (1996) 13 Cal. 4th 893, 938.) The question is also objective and

looks at "whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." (Restatement (second) of Torts § 826, com. c, p. 121.)

Not once do the Plaintiffs allege how and why the Defendants' conduct was substantial and unreasonable. (*Id.* ¶ 120.) Plaintiffs allege Defendants' indoor gatherings constituted a substantial interference because they "significantly increased the risk of further community spread of COVID-19." (*Id.*) Plaintiffs also allege Defendants' conduct was unreasonable "because the social utility of Defendants' reckless contravention of the public health orders – i.e., their ongoing refusal to submit and implement a Social Distancing Protocol, or require personnel and congregants to wear face coverings, socially distance, or refrain from singing indoors – was eclipsed by the gravity of the harm inflicted by such conduct." (*Id.*) These are merely conclusory statements and do not support a nuisance cause of action.

Defendants anticipate that Plaintiffs will argue they have pleaded a cause of action for nuisance because members of the church tested positive for COVID-19. Under that standard, any entity could be deemed a public nuisance. COVID-19 was a global pandemic that infected "more than 3.7 million people…in California." (*Id.* ¶ 22.) Given the virus' pervasiveness, it would be statistically impossible for the Defendants to be unaware of any person who contracted COVID-19. Further, the fact that the Defendants flouted the public health orders is immaterial, as even an entity that followed the orders or an essential business that was allowed to stay open would be aware of someone who contracted COVID-19. What is telling is that Plaintiffs do not allege whether the members of the church who allegedly contracted COVID-19 quarantined or were in contact with members of the public or whether the COVID-19 cases were isolated or ongoing events. (*Id.* ¶¶ 120-22.) These omissions are fatal to Plaintiffs' public nuisance claim.

1. The City Has Failed to Plead that Defendants' Church Services Affected a Considerable Number of Persons at the Same Time.

The Plaintiffs' second cause of action for public nuisance also fails because the FAC does not allege an essential element – that Defendants' church services "affect[ed] at the same time an entire community or neighborhood, or any considerable number of persons." (Civ. Code, § 3480.) Plaintiffs allege Defendants' indoor gatherings constituted a public nuisance. (*Id.* ¶ 119; *See* Civ.

Code, § 3479 ["Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances. . . is a nuisance."].) To plead a cause of action for public nuisance, however, a plaintiff must also allege that the defendant's conduct "affected a substantial number of people at the same time." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548; *see also People v. Robin* (1943) 56 Cal.App.2d 885, 889 [explaining that a nuisance is not a public nuisance if it does "not affect any part of a neighborhood or any considerable number of people"].)

The FAC's conclusory assertion that Defendants' unlawful indoor gatherings interfered with "an entire community or neighborhood" lacks "sufficient particular facts from which the existence of a public nuisance can be deduced." (FAC ¶ 118; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 131; *Mittenhuber v. City of Redondo Beach* (1983) 142 Ca1.App.3d 1, 5 ["General allegations are . . . inadequate" for statutory causes of action.].) In *People ex rel. Stephens v. Seccombe* (1930) 103 Cal.App.306, 308-09, for example, the Los Angeles City Attorney alleged that the defendant's illegal conduct amounted to a public nuisance. (*Id*.) In affirming the trial court's ruling, the Court of Appeal explained that the complaint was deficient because it contained "no allegation of facts, as distinguished from conclusions of the pleader, which, being deemed true, would support a conclusion of law that the defendant's course of conduct constitutes an obstruction to the free use of the property . . . of 'an entire community or neighborhood, or any considerable number of persons.'" (*Id.* at p. 310 [quoting Civ. Code, § 3480].) The same conclusion applies here. Even if Defendants' gatherings were unlawful, merely alleging unlawful conduct is insufficient to plead a nuisance cause of action.

Furthermore, alleging isolated and vague episodes of COVID-19 is also insufficient to survive a demurrer. Plaintiffs ask this Court to adopt an unprecedented and dangerous expansion of public nuisance law. For decades, California's public nuisance statute has been effectively employed to address problems such as the pollution of streams, noxious gases from a creamery, dust and noise from cement plants and, more recently, contemporary concerns from lead paint poisoning and climate change to gun manufacturing. (*See, e.g.*, *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 58-59 [summarizing cases].) These cases all share a common characteristic: the nuisance must affect "an entire community or neighborhood, or any considerable number of persons"—and "at the same

time." (Civ. Code, § 3480.) Plaintiffs allege members of the Church contracted COVID-19 but fail to allege whether these members were in contact with an entire community or a large sector of the public, let alone one member of the public. Because the FAC fails to allege this essential element, the Court should sustain the demurrer to the public nuisance cause of action.

2. The Plaintiffs Have Failed to Plead Defendants' Conduct Caused the Speculative Harm Alleged in the FAC.

Causation is also an essential element of a public nuisance claim. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359.) In pleading causation, a plaintiff must demonstrate that the defendant's conduct was a "substantial factor in bringing about the result." (*People v. ConAgra Grocery Prod. Co.* (2017) 17 Cal.App.5th 51, 101.) The substantial factor standard requires "that the contribution of the individual cause be more than negligible or theoretical." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978.) If a defendant's conduct operated concurrently with other forces to produce the harm, it is a substantial factor so long as "the injury, or its full extent, would not have occurred but for that conduct." (*In re Ethan C.* (2012) 54 Cal.4th 610, 640.) The Plaintiffs must therefore demonstrate that Defendants' conduct was necessary in bringing about the full extent of the harm alleged in the FAC. (*City & Cty. of San Francisco v. Purdue Pharma L.P.* (N.D. Cal. 2020) F.Supp.3d, 2020 610, 677.)

There is no "connecting element" or a "causative link" between the Defendants' church services and the transmission of even one COVID-19 case. Rather, there is only unconvincing speculation and, at best, misconstrued facts. Plaintiffs allege members of the Church contracted COVID-19, but this allegation is misleading. Although some members may have contracted COVID-19, there are no facts linking the cases to Defendants' indoor gatherings. The members could have easily contracted COVID-19 outside the Church. As far as can be gleaned from the FAC, Defendants' contributions to the COVID-19 cases were only "theoretical." (*Rutherford, supra*, 16 Cal.4th at p. 978.) Plaintiffs, therefore, have failed to state a cause of action for public nuisance.

IV. CONCLUSION

Considering the foregoing, Defendants request that this Court dismiss Plaintiffs' FAC with prejudice.

DATED: August 31, 2021

TYLER & BURSCH, LLP

By: /s/Mariah R. Gondeiro
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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 August 31, 2021, I served a copy of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION** 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

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