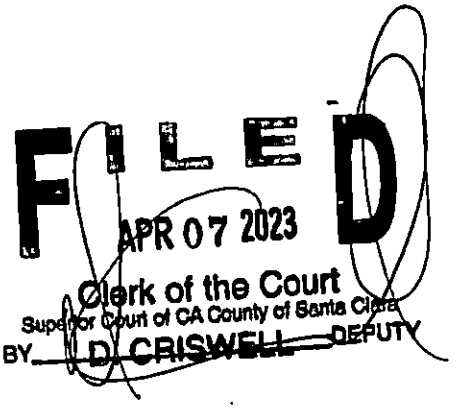

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, and SARA H. CODY, M.D., in her official capacity as Health Officer for the County of Santa Clara, Plaintiffs, v. CALVARY CHAPEL SAN JOSE; MIKE MCCLURE, and DOES 1-50, Defendants.	Case No. 20CV372285 **ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION; DENYING DEFENDANTS' MOTION TO STAY**

Plaintiffs' the People of the State of California, the County of Santa Clara (the "County"), and Dr. Sara H. Cody in her official capacity as Health Officer for the County of Santa Clara's (collectively, "Plaintiffs") motion for summary adjudication against defendants Calvary Chapel San Jose ("Calvary") and Mike McClure ("McClure") (collectively, "Defendants") came on for hearing before the Court on March 14, 2023. Pursuant to California Rule of Court 3.1308, the Court issued its tentative ruling on March 13, 2023. The parties appeared for argument, and the Court took the matter under submission. Having considered the argument, briefing and relevant case law, the Court now issues its final ruling.

I. Background

A. Factual

Except as noted below, the parties largely agree to the material facts that give rise to this case.

Covid-19 is a contagious disease the outbreak of which led the County to declare a local health emergency on February 3, 2020. (Defendants' Supplemental Response to Plaintiffs' Separate Statement of Undisputed Facts ("DSU") Nos. 1-2.) A month later, on March 4, 2020, Governor Newsom declared a state of emergency, and a week later the President declared a national emergency. (DSU Nos. 3, 4.) The World Health Organization declared Covid-19 a pandemic on March 11, 2020, and experts consider this outbreak the worst public health epidemic since the influenza outbreak of 1918. (Declaration of Sara H. Cody, M.D. In Support of Plaintiffs' Motion for Summary Adjudication ("Cody Decl."), ¶¶ 6-7.)

Santa Clara County is comprised of 15 cities with a population of approximately 1.9 million people. (Cody Decl., ¶ 5.) To address the spread of Covid-19 between and amongst those 1.9 million people, between March 2020 and June 2021, the County Health Officer issued public health orders. (DSU Nos. 5, 15.) These public health orders included:

- July 2, 2020 (effective July 13): Order (County) Establishing Mandatory Risk Reduction Measures Applicable to All Activities and Sectors to Address the Covid-19 Pandemic (the "Risk Reduction Order"). (DSU Nos. 6, 7).
    - This order required, *inter alia*, that all individuals wear face coverings when entering business facilities or using public transportation, and submit a Social Distancing Protocol ("SDP"). The SDP required businesses to attest that they would implement various categories of Covid-19 safety measures, including, but not limited to: (1) training personnel about Covid-19; (2) instituting a process for reporting positive Covid-19 cases to the County; and (3) agreeing to follow any applicable State or County public health orders, guidance, or directives. (DSU No. 28.)

- October 5, 2020: Order of the Health Officer of the County of Santa Clara Establishing Mandatory Risk Reduction Measures Applicable to All Activities and Sectors to Address the Covid-19 Pandemic (the "Revised Risk Reduction Order"), which order superseded the Risk Reduction Order on October 14, 2020. (DSU No. 8, 9).
    - This order required compliance with the California Department of Public Health's ("CDPH") mandatory guidance on face coverings, which required the use of face coverings in *all* indoor public spaces with limited exceptions such as for those with medical conditions or disabilities, and while actively eating or drinking. The order still required all businesses to submit an SDP.
- May 18, 2021: Order of the Health Officer of the County of Santa Clara Establishing Focused Safety Measures to Protect the Community from Covid-19 (the "Safety Measures Order"). (DSU No. 10.) This superseded the Revised Risk Reduction Order on May 19, 2021. (DSU No. 11).
    - Under this order, businesses were no longer required to submit SDPs, but were required to follow the County's May 18, 2021 Mandatory Directive on Face Coverings (see below).
- May 18, 2021: By the County Health Officer, a Mandatory Directive on Face Coverings. (DSU No. 12.).
    - This order required compliance with the May 3, 2021 CDPH mandatory guidance regarding face coverings.
- June 21, 2021: By the County, Order of the Health Officer of the County of Santa Clara Phasing Out the May 18, 2021 Health Order Given Widespread Community Vaccination (the "Phase Out Order"). (DSU No. 13.).
    - This order rescinded the provisions of the May 18, 2021 Order relevant to this case.
- Between June 18, 2020 and May 3, 2021: the California Department of Public Health issued Guidance for the Use of Face Coverings. (DSU No. 15.)

On August 11, 2020, the County Board of Supervisors adopted Urgency Ordinance No. NS-9.921 (the "Urgency Ordinance"). (DSU No. 14.) This ordinance was adopted to create a comprehensive program to civilly enforce the various public health orders and, as relevant here, did two key things: (1) declared that violations of the State and County public health orders constitute an imminent threat and menace to public health and are therefore a public nuisance; and (2) set a range of fines for violations of public health orders. Civil penalties differed depending on whether the subject violation involved non-commercial versus commercial activities, and the latter was defined to mean "any activity associated with a Business or with a commercial transaction." (Plaintiffs' Request for Judicial Notice ("RJN"), Exhibit 159 at §2(b)(2).) A "Business," in turn, is defined by the Urgency Ordinance 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." (*Id.*)

Calvary is a domestic non-profit corporation operating a church at 1175 Hillsdale Avenue in San Jose and McClure is its Senior Pastor, and thus qualifies as a "business" under the Urgency Ordinance. (DSU Nos. 16, 17.) Calvary offers many services like marriage and addiction counseling, prayer, women's coffee and teas, men's breakfast, bible studies, and youth ministry programs like Friday night fellowship, summer fun days, and summer and winter camps. (Declaration of Mike McClure in Support of Defendants Calvary Chapel San Jose's and Mike McClure's Opposition to Plaintiffs' Partial Motion for Summary Adjudication ("McClure Decl."), ¶ 3.) Calvary also has a ministry through its branch, Calvary Christian Academy (the "Academy"), which is located across the street from the church. (McClure Decl., ¶ 2.)

In March 2020, Calvary closed in-person services and contends that in so doing immediately experienced a decline in spiritual, emotional, and mental health amongst its congregants. (McClure Decl. ¶ 4.) According to its Pastor, Mike McClure, "fellowship requires the gathering of ALL church member [sic] together in person, as fellowship represents the Body of Christ." (McClure Decl. ¶ 8.) Pastor McClure further cites to Acts 2:42 as an example of what he describes as "the early church": "And they continued steadfastly in the

apostles' doctrine and fellowship, and in breaking of bread, and in prayers." (McClure Decl. ¶ 9; see also *id.* at ¶ 11 ("Hebrews 10:25 exhorts Christians to not give up meeting together, 'as some are in the habit of doing, but encouraging one another—and all the more as you see the Day approaching'".)

Accordingly, Calvary reopened and began holding in-person worship on May 31, 2020. (McClure Decl., ¶ 4.) From that date through May 2021, Calvary held two Sunday services, averaging attendance of 300-500 congregants; prayer gatherings one or twice a week ranging from 2 to 20 attendees; and about 1000 baptisms per year from May 2020 through August 2022. (McClure Decl., ¶¶ 8, 17-18.) Although Calvary contends masks were made available and there was ample space in the church to permit social distancing, there is no dispute that at least during each of these services, baptisms and prayer meetings, attendees were not *required* to wear face coverings or to socially distance, and that none of these activities was held outside. (See generally McClure Decl., ¶¶ 7, 9-16; see also Declaration of Stephanie Mackey in Support of Plaintiffs' Motion for Summary Adjudication ("Mackey Decl.") and accompanying exhibits; Plaintiffs' Statement of Undisputed Facts ("PSU") Nos. 18, 19.) Defendants' maintain, however, there is no evidence such indoor, unmasked events occurred every day between November 9, 2020 and June 21, 2021, since Defendants did not inspect Calvary's premises every one of those days. (DSU, No. 18.)

Defendants were not only holding these events without masks or social distancing, but were also live streaming and otherwise advertising online that they were doing so, sometimes commenting directly on Calvary's dispute with the County over the Public Health Orders. (Mackey Decl. and accompanying exhibits.) For example, on December 13, 2020, Pastor McClure states: "I do applaud you. Thank you, thank you for coming in this dark time. . .to gather together to obey God's word and we're not here to fight the government but to stand for the freedom that God has given us and the right to worship." (Mackey Decl., ¶ 26, Ex. 43.) At several services, Pastor McClure refers to the service as a "protest" (Mackey Decl., ¶ 7, Ex. 8; ¶ 9, Ex. 12; ¶ 17, Ex. 27; ¶ 28, Ex. 48; ¶ 38, Ex. 72), elsewhere he advises that "People are going to do what they want to do, I'm not a policeman. . . ." (Mackey Decl., ¶ 24, Ex. 41.)

There also appear to be at least some services where Pastor McClure is advising or at least strongly suggesting that his congregants not wear masks or social distance, even if they might get sick and/or die:

> October 11, 2020: "Obviously, you're here today so you don't care if you get sick. No one here, by the way, has gotten sick, gone to the hospital, or died from this thing, by the way. *You're all like, 'I'm ready to die, I don't care, I'm going to church.*'" (Mackey Decl., ¶ 11, Ex. 16 (emphasis added).)
>
> November 22, 2020: "There's all these studies that say look, don't wear your mask when you're exercising, you know, um, [laughs] I think you shouldn't wear 'em when you're, you know, I can't think with them on, that's just me. . . You have a 99.99% chance of not dying if you catch the virus." (Mackey Decl., ¶ 19, Ex. 32.)
>
> January 10, 2021: "You can't tell a Christian not to preach the name of Jesus Christ, or to praise his name, or to gather in his name—the right from God—*And who cares what the cost is*. . . ." (Mackey Decl., ¶ 34, Ex. 61(emphasis added).)
>
> January 10, 2021: "The third misconception. . . for Christians is that [the world] think[s] they can, like brutalize them or threaten them to get them to do what they want. . . 'Speak no more, teach no more in his name or else we're gonna go after you. Your fines are going to go up to $1.5 million. $80,000 and $23,000 for you personally!' And that's what they're doing to me now and it's like, OK, but you know. . . *I'm willing to die for the truth.* I've died a long time ago. . . .I think about our government's infringement on our liberties. I think about this whole thing, Covid-19, it's. . .it was all set up. We were played. This whole thing, it's a lie. I mean, not that it's not a disease. But they're using it to take control and to stop you and I from worshipping God. That's what they're doing. . . They're

trying to take away our freedom. This is religious persecution in America." (Mackey Decl., ¶ 35, Ex. 65 (emphasis added).)

April 11, 2021: "One of these reporters outside the courthouse. . . one time he says, 'Just tell me, why aren't you wearing a mask?'. . .So, I said, 'Well, because *I'm not afraid to die.* But I bet you're wearing yours—and I'm not saying wearing a mask or not wearing a mask-most of the time we're wearing these things because we're afraid to die. We're trying to protect ourselves in any way possible.' And I said, 'Is that true?' And he said, 'Yeah, I would think you would do anything to save your life.' And I said, 'That's where you're wrong with Christians, because *we're told to lose our life.* And if we lose it for Jesus Christ and the sake of the gospel, we will find it.'. . . *And I can assure you I am not afraid of Covid. I am not afraid of Covid-21, 22, 23 [laughter].*" (Mackey Decl., ¶ 59, Ex. 113 (emphasis added).)

April 25, 2021: "Everyone believes this, you go hide in your houses and quarantine and you need to save yourself. I have often asked myself, 'Why are people so mad if I don't have a mask on?" And I have realized it's because it's not about my safety, it's about their safety. And apparently, their mask isn't enough. I have to have one on even though they have two on! I look and think, there have been two Stanford studies that say how bad it is, because you're literally just breathing CO2. You're gonna give yourself Covid. It's not good for you. It's just not, it's not healthy to wear a mask all day. If that offends you, let the truth hurt. It's just not good for you. . . It makes us almost moldable so the elites can lead a society that's not thinking clearly because they're not getting enough oxygen [laughter]. . .You know, all of this is being foisted upon us to control us and bring us to the point where we don't trust anybody and anything. . .

You see, a lot of what's happening today is witchcraft in our culture. . .."

(Mackey Decl., ¶ 63, Ex. 120.)

Pastor McClure's comments also suggest that Calvary experienced increased donations as a result of the services reflected in the Exhibits attached to the Mackey declaration. At a March 21, 2021 service, Pastor McClure states: "We had a construction loan of $1.9 million and. . . people all over the country now, who have been watching what's going on here.. . they've sent some money to help us pay down our debt. . . So we had $1.9 million dollars last year in this construction loan. . . and now we're down to under $700,000 today." (Mackey Decl., ¶ 53, Ex. 103.)

Pastor McClure and other Calvary staff testified that between August 2020 and June 2021, staff and attendees of the church contracted Covid-19 and displayed symptoms consistent with the virus. (PSU Nos. 47, 48.) However, Calvary contends that "Plaintiffs cannot trace one Covid-19 case to the church." (DSU Nos. 47-48.) It is undisputed, however, that in late December 2020 and early January 2021, certain students and teachers at the Academy tested positive for Covid-19, and the school was closed for two weeks due to the "aggressive" spread of the virus through the school. (DSU No. 50.) The families of some of the Academy's students and staff attend church at Calvary, although Defendants contend there is no evidence they attended the church during the time they were sick. (DSU No. 51.) Defendants did not report the positive Covid-19 cases to the County, although Defendants appear to argue that they did not make such reports because the cases were not "confirmed". (DSU No. 52.)

As a result of Calvary's activities, on November 9, 2020, the County issued a Notice of Violation ("NOV") to Defendants for failing to require personnel, congregants and visitors to wear face coverings as required by the Revised Reduction Order and the Gatherings Directive. (PSU No. 20.) The NOV included a separate $1,000 fine for each violation. (PSU No. 21.) Under the Urgency Ordinance, each $1,000 fine doubled every day the violations were not corrected up to a maximum of $5,000, and then continued to accrue daily at $5,000 until the violations were corrected. (PSU No. 22.) The violations would be deemed corrected if Defendants submitted a sworn compliance statement confirming correction of the violations

noted in the Notice; no such compliance statement was ever submitted. (PSU Nos. 23, 24.) According to Plaintiffs', Defendants' fines for failing to require personnel or attendees to wear face coverings began accruing on November 9, 2020, and between that date and June 21, 2021, amount to $2,234,000. (PSU Nos. 25, 26.) Defendants contend not only that there is no evidence that they failed to wear face coverings every day between November 9, 2020 and June 21, 2021, but also that they never received proper notice of the November 9, 2020 NOV because it was improperly served. (DSU Nos. 18-23, 25-26.)

The County also contends that between August 23, 2020 and May 18, 2021, Defendants did not submit an SDP through the County's online portal. (DSU No. 29.) Defendants dispute this, as they claim they attempted to submit an SDP but it was not complete, so the County rejected it. (DSU No. 29 ("Undisputed that Calvary did not submit a **completed** SDP, Calvary did attempted to submit a modified form."); Supplemental Declaration of Mariah R. Gondeiro In Support of Defendants' Opposition ("Supp. Gondeiro Decl.).)

On August 23, 2020, the County issued a NOV to Defendants for failing to submit an SDP, charging the minimum $250 fine. (DSU Nos. 30, 31.) Under the Urgency Ordinance, the $250 fine doubled every day that Defendants failed to submit an SDP until the fine reached $5,000, after which the fine accrued at $5,000 per day every day thereafter. (DSU No. 32.) Defendants' fines for failing to submit an SDP began accruing on August 23, 2020 and ran through May 18, 2021, when the Social Distancing Protocol was rescinded, and total $1,327,750. (DSU Nos. 33, 34.)

Defendants appealed the notices of violation and fines in the amount of $327,500 that were imposed between August 23, 2020 and October 18, 2020 to the Office of the County Hearing Officer; these included the August 23, 2020 NOV for the SDP violation and the associated $250 fine and fines that accrued thereafter. (DSU Nos. 35, 36.) In the course of their appeal, Defendants conceded that they violated various public health orders. (DSU No. 37.) On November 2, 2020, the County Hearing Officer upheld the notices of violations cited between August 23, 2020 and October 18, 2020, including the SDP violation and fines. (DSU No. 38.)

Defendants challenged the County Hearing Officer's decision by filing a writ in the Superior Court. (DSU No. 39.) In that proceeding, Defendants did challenge the constitutionality of the SDP requirements and the amount of fines imposed, but they aver that they did not have "a meaningful opportunity to litigate" their constitutional claims. (DSU No. 40.) And, while the Court upheld the County Hearing Officer's decision and rejected Defendants' First Amendment Challenge to the SDP requirement and their Eighth Amendment challenge to the fines imposed by the County up to that date, it cannot be disputed that the focus of the parties' briefing and argument during that proceeding was the County's ban on indoor gatherings. (DSU No. 41.) On May 7, 2021, Defendants filed a notice of appeal of the foregoing order, but voluntarily abandoned that appeal on June 24, 2021 because Defendants understood the Court's ruling to be non-appealable. (DSU Nos. 42, 43.)

To date, Defendants have failed to pay the outstanding administrative fines for the face covering and SDP violations, and owe a late fee of 10 percent on those amounts. (PSU Nos. 44, 45.) Defendants therefore owe $3,917,925 in fines for the face covering and SDP violations. (Plaintiffs' RJN, Exhibit 191.) However, Plaintiffs state that in an exercise of prosecutorial discretion, they seek a reduced amount of $2.8 million. Defendants again dispute that they owe these monies. (DSU Nos. 45-46.) And, while Defendants cannot dispute that they possess the funds to pay the fines and late fees, they contend that these fines are unconstitutionally excessive, they did not act with the requisite culpability to justify these fines and that requiring them to pay this amount will impair their ability to minister to the public. (DSU No. 53.)

B. Procedural

Plaintiffs initiated this action and sought injunctive relief in October 2020. On November 2, 2020, the Court issued a temporary restraining order, and on November 24, 2020 issued a modified temporary restraining order and preliminary injunction enjoining Calvary from violating restrictions on indoor gatherings and requirements for face coverings and social distancing and from operating without submitting a SDP to the County.

Calvary violated these court orders. As a result, Defendants sought then obtained a contempt order on December 17, 2020. After further non-compliance, the Court issued a

further contempt order on February 16, 2021 and ordered Calvary and McClure to pay monetary sanctions pursuant to Code of Civil Procedure sections 177.5 and Code of Civil Procedure section 1218, subdivision (a).

Calvary sought review of the contempt and sanctions orders in the instant action and two other actions involving the same parties. On August 15, 2022, the appellate court reversed the sanctions order and annulled the contempt orders pursuant to the then recent United States Supreme Court decisions regarding the First Amendment's Protection of the free exercise of religion in the context of public health orders (see, e.g., *Tandon v. Newsom* (2021) 593 U.S. __ [141 S. Ct. 1294]). The appellate court concluded that, under those decisions, the temporary restraining orders and preliminary injunctions were facially unconstitutional because they banned indoor worship. The appeal did not address the propriety of the County's orders requiring face masking and social distancing protocol or the fines assessed for Defendants' violations of those orders. The appellate court nevertheless found it was required to reverse the imposition of fines and sanctions in their entirety because the trial court's orders had not differentiated between indoor gatherings and other forms of wrongdoing.

Plaintiffs filed the operative FAC on July 29, 2021, asserting claims for: (1) public nuisance per se; (2) public nuisance; (3) violation of County and State public health orders; (4) violation of County Urgency Ordinance No. NS-9.21; and (5) violation of Government Code § 25132. On August 26, 2022, Plaintiffs filed the instant motion seeking to summarily adjudicate the first, third, fourth and fifth causes of action in their favor. Defendants oppose the motion.

II. Defendants' Request for Additional Discovery

Defendants insist that summary adjudication is inappropriate at this time because further discovery is needed. Defendants made this same argument by ex parte application filed on December 29, 2022, which application identified the need to (1) obtain correspondence regarding complaints concerning non-commercial activities and (2) conduct the deposition of the enforcement officer who signed off on the November 9, 2020 NOV. Although there was some confusion regarding resetting of this hearing, the Court ultimately considered and rejected Defendants' discovery argument. Moreover, since their ex parte application, it appears that

Defendants have deposed the enforcement officer who served the November 9, 2020 NOV, and missed the deadline to compel the additional discovery they maintain they have yet to receive from the County. (See Plaintiffs' Reply at p. 10, fn. 20.)

The Court has also reviewed the entirety of the evidence Defendants submitted to the Court with their opposition, including the portions of deposition transcripts of Dr. Sara Cody, Dr. Sarah Rudman, Michael Balliet, and Melissa Huerta and the Declarations of Mike McClure, William M. Shepherd, Carson Atherley, Barry Arata, Stephen E. Petty, P.E., C.I.H., C.SP., Ram Duriseti, M.D., PhD, Mariah Gondeiro, and Nada N. Higuera. The Court also reviewed and considered (over Plaintiffs' objections) Defendants' late filed Supplemental Response to Plaintiffs' Separate Statement of Undisputed Material Facts and Supplemental Declaration of Mariah R. Gondeiro In Support of Defendants' Opposition, including Exhibit A to that Supplemental Declaration. Although Defendants submitted these materials to the Court after the Court issued its tentative ruling and they are therefore improperly late, neither document changes the evidence already submitted in the case—Defendants' Supplement Response to Undisputed Facts is based on the same evidence the Court already considered in its tentative ruling, and the Supplemental Declaration attaches an email confirming Defendants submitted a revised SDP through counsel on or around February 19, 2021—a fact Plaintiffs do not dispute.

Defendants' own evidence demonstrates that Defendants did ask questions of Dr. Sara Cody, Dr. Sarah Rudman, Michael Balliet, and Melissa Huerta about the potential selective enforcement of the Urgency Ordinance. Defendants have also had over two years to pursue discovery both here and in the federal action, have consistently maintained that the County's health orders were unconstitutional since the appeal of the administrative proceeding, and obtained several opinions from appellate courts and the U.S. Supreme Court outlining that court's clear views regarding the constitutionality of COVID-19 public health orders (or lack thereof). On this record, there is no good cause for a continuance for further discovery to be conducted; the matter is ripe for summary adjudication. *See Johnson v. Alameda County Med. Ctr.* (2012) 205 Cal.App.4th 521, 532; *Santos v. Crenshaw Mfg., Inc.* (2020) 55 Cal.App.5th 39,

47; *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246; *Mengers v. Department of Transp.* (2020) 59 Cal.App.5th 13, 25-26; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149 166-168.

III. Requests for Judicial Notice

A. Plaintiffs' Request

Plaintiffs request that the Court take judicial notice of materials relating to the Covid-19 pandemic, including: government-issued (at federal, state and county level) proclamations and public health orders; ordinances issued by the County and other Bay Area counties; guidance issued by the California Department of Public Health; items from the administrative hearing before the Santa Clara County Office of the County Hearing Officer; social distancing protocol forms issued by the County; items from Calvary's appeal of fines issued by the County in the matter entitled *Calvary Chapel San Jose v. County of Santa Clara,* Case No. 20CV374470; and transcripts from the contempt hearing before the Court. (See Declaration of Karun Tilak in Support of Motion for summary Adjudication ("Tilak Decl."), pp. 150-178.)

Each of the foregoing items are proper subjects of judicial notice pursuant to Evidence Code section 452, subdivisions (b), (c), (d) and (h), as "[r]egulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States," "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States," "[r]ecords of [] any court of this state or [] any court of record of the United State or of any state of the United States," and "facts and propositions that are not reasonably subject to dispute." Accordingly, Plaintiffs' request for judicial notice is GRANTED.

B. Defendants' Request

Defendants request the Court take judicial notice of Mandatory Directives for case reporting, capacity limitations and gatherings for different types of activities, businesses and industries issued by the County (Exhibits 1-17, 22, 23); ordinances and other orders relating to Covid-19 adopted and/or issued by the County or other Bay Area counties (Exhibits 18-21); and Covid-19 guidance materials issued by the State of California or the California Department of Public Health (Exhibits 24-26, 28). The foregoing materials are proper subjects of judicial

notice under Evidence Code section 452, subdivisions (b) and (c). Accordingly, Defendants' request for judicial notice is GRANTED.

IV. Plaintiffs' Motion for Summary Adjudication

A. Burden of Proof

The party moving for summary judgment/adjudication bears the initial burden of production to make a prima facie case showing that there are no triable issues of material fact – one sufficient to support the position of the party in question that no more is called for. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Plaintiffs moving for summary judgment bear the burden of persuasion that each element of the cause of action in question has been proved, and hence there is no defense thereto. (Code Civ. Proc., § 437c.) Plaintiffs, who bear the burden of proof at trial by preponderance of evidence, therefore "must present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not- otherwise he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar, supra,* 25 Cal.4th at 851.) The defendant has no evidentiary burden until the plaintiff produces admissible and undisputed evidence on each element of a cause of action. (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2013), ¶ 10:238.) If the plaintiff meets this initial burden, the burden then shifts to the defendant to "show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).)

B. First and Third Causes of Action: Nuisance Per Se and Violation of County and State Public Health Orders

Plaintiffs' first and third causes of action are predicated on Defendants' alleged violations of the Risk Reduction Order, the Revised Risk Reduction Order, and the Safety Measures Order (collectively, the "Public Health Orders") by their failure to (1) wear face coverings or maintain adequate distances between personnel and attendees and (2) submit an SDP to the County.

"A nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular … activity, or circumstance, to be a

nuisance." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163, internal citations and quotations omitted.) "Where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made." (*Id.*, internal citations and quotations omitted.)

The County Board of Supervisors, a legislative body, possesses the appropriate jurisdiction (see Cal. Const., art. XI, § 7), and its regulatory power "not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases" (*Ex parte Shrader* (1867) 33 Cal. 279, 284; see Gov. Code, §§ 25845 and 53069.4). The Board exercised this power by enacting the Urgency Ordinance, and in doing so expressly declared any violation of the Public Health Orders to be a nuisance. (Plaintiffs' RJN, Ex. 159, §§ 1(a), 3.)

While Defendants contend they did not hold church events so cannot have been observed violating the mask requirements every day, Defendants' violations of the Public Health Orders' face coverings and SDP requirements are otherwise undisputed. (PSU Nos. 18, 19, 29, 37.) It is also undisputed that the Public Health Orders required Defendants' personnel and members of the public entering Defendants' facilities to wear face coverings. Defendants expressly admitted under oath that they refused to require or enforce the wearing of face coverings during the time period they were required to do so; they publicly broadcasted large events where face coverings were not worn; and County enforcement officers confirmed through regular inspections that personnel and attendees were not required to wear face coverings. Defendants also admit they never submitted a completed SDP to the County through its online portal. (DSU No. 29.) Although, according to Defendants, they twice attempted to do so, but the County refused their submission.

Plaintiffs have plainly established that (1) Defendants violated the Public Health Orders, and (2) these violations are a nuisance because the Urgency Ordinance so states, and thus Plaintiffs have met their initial burden on the first and third causes of action.

C. Fourth and Fifth Causes of Action: Violation of County Urgency Ordinance No. NC-9.21 and Violation of Government Code Section 25132

Per its express terms, violations of the Public Health Orders qualified as violations of the Urgency Ordinance, which authorizes the County "to file a civil action on behalf of the County ... to recover all associated County costs, attorneys' fees, and any fines or penalties imposed" imposed thereunder. (Plaintiffs' RJN, Exhibit 159 at §§ 3 and 4.f.2.) Government Code Section 25132 similarly authorizes the County to prosecute such an action. (See Gov. Code, § 25132, subdivision (a) ["[t]he violation of a county ordinance may be prosecuted by county authorities in the name of the people of the State of California, or redressed by civil action."].)

Defendants clearly violated the Public Health Orders' face covering and SDP requirements. (DSU Nos. 18, 19, 29, 37.) The August 23, 2020 NOV imposed a fine of $250 for Defendants' failure to submit a completed SDP as required, and these fines continued to accrue as Defendants did not submit a completed SDP through the County's online portal at any time between August 23, 2020 and May 18, 2021. (PSU Nos. 29, 37.) The August 23 SDP fine started at $250 (the minimum), doubled to $500 on August 24, $1,000 on August 25, $2,000 on August 26, and $4,000 on August 27, and then increased to $5,000 (the maximum) on August 28, 2020. (See Declaration of Jamila G. Benkato in Support of Plaintiffs' Motion for Summary Adjudication ("Benkato Decl."), ¶ 151, Exhibit 191, Columns B and C.) The fine then accrued at $5,000 every day that Defendants failed to submit an SDP, totaling $1,327,750 on May 18, 2021. (DSU Nos. 31-34.)

The November 9, 2020 NOV imposed two $1,000 fines (the minimum)- one for failing to require personnel to wear face coverings and one for failing to require members of the public to do the same. (PSU Nos. 20, 21.) Because Defendants continued to violate the face covering requirements, the fines continued to accrue as follows: doubled to $2,000 on November 10, doubled again to $4,000 on November 11, and then increased to $5,000 (the maximum) on November 12, 2020, after which they accrued at $5,000 for every day that Defendants continued to violate the orders. (Benkato Decl., Exhibit 191, Columns D-F.) By June 21, 2021,

Defendants had accrued $2,234,000 in fines for failing to correct the two face covering violations. (PSU Nos. 25-26.)

Under the Urgency Ordinance, fines are due within 30 days of service of an NOV or 30 days after the conclusion of any administrative appeal. (Plaintiffs' RJN, Exhibit 159 at § 6(g).) Defendants filed an administrative appeal of the August 23, 2020 NOV, and the Hearing Officer issued its decision on November 2, 2020, meaning that the fine for the SDP violation was due 30 days later. (DSU Nos. 35-38.) Defendants did not seek administrative appeal of the November 9, 2020 NOV; consequently, those fines were due within 30 days of that NOV. (PSU No. 27.) To date, Defendants have not paid any of the administrative fines. (DSU No. 44.) The Urgency Ordinance authorizes a late fee of 10 percent of any fines not timely paid, resulting in late fees totaling $356,175. (Plaintiffs' RJN, Exhibit 159 at § 6(i); PSU No. 45.)

Given the foregoing, Plaintiffs have established that Defendants accrued administrative fines through their continued violations of the Public Health Orders and have failed to pay those amounts, resulting in the imposition of late fees. Thus, they have met their initial burden on the fourth and fifth causes of action.

D. Defendants' Constitutional Defenses

1. Defendants' Constitutional Challenges are Not Precluded By the Superior Court Order on County Hearing Officer's Decision

Relying on the doctrine of collateral estoppel, Plaintiffs insist summary adjudication of these claims is warranted, at least with respect to the SPD-related fines, for the additional reason that this Court's April 8, 2021 order on Defendants' appeal of the County Hearing Officer's decision sustaining the August 23, 2020 NOV and the fines in *Calvary Chapel v. County of Santa Clara*, Case No. 20CV374470 has a preclusive effect on Defendants' ability to litigate the existence of the SDP violations here.

The doctrine of collateral estoppel bars "relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in

privity with a party at the prior [proceeding]." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90, quoting *People v. Carter* (2005) 36 Cal.4th 1215, 1240; see also *Lucido v. Super. Ct.* (*People*) (1990) 51 Cal.3d 335, 341.)

Here, Plaintiffs appealed the County Hearing Officer's final administrative decision under Government Code section 53069.4, which permits a person contesting the final administrative order or decision of a local agency made pursuant to an ordinance regarding the imposition, enforcement, or collection of administrative fines or penalties to seek review by filing an appeal with the superior court as a limited civil proceeding. (Gov. Code, § 530069.4, subd. (b)(1).) Notably, the parties do not dispute that the hearing officer is expressly precluded from considering constitutional challenges to the Public Health Orders as part of the administrative hearing. Defendants were not precluded, however, from making such arguments on their appeal of the County Hearing Officer's decision to the Superior Court. After the Court issued its order sustaining the County Hearing Officer's decision, Defendants filed a notice of their intention to appeal the decision, but then abandoned it. Because of this, Plaintiffs insist, Defendants cannot relitigate the same issues in this action.

The Court's decision affirming the County Hearing Officer's ruling discusses the Defendants' Free Exercise and unconstitutional conditions arguments, "reject[ing] Petitioner's claim that the requirement of an [SDP] burdens Petitioner's free exercise" and finding that Petitioner Calvary failed to show that submission of an SDP "would in any way infringe on its worship services." (Plaintiffs' RJN, Ex. 169 at pp. 5-9; Exhibit 170 at p. 7.) The Court also appears to have decided the constitutionality of the face coverings and sustained the fines based on violations identical to those at issue in the November 9, 2020 NOV (they proceeded the violations reflected in the November 9 NOV) because it found that "no court has relieved Petitioner of its obligation comply with the requirement of face coverings and physical distancing." (Plaintiffs' RJN, Exhibit 170 at p. 6.)

However, review of the parties' briefing and the portions of transcript of the hearing on Defendants' appeal reveals that collateral estoppel should not be applied here. While it is clear that Defendants' briefed and argued the unconstitutionality of the fines, their argument in that

proceeding was based on the prohibition on indoor gathering, which had then recently been found unconstitutional by the U.S. Supreme Court in *Gateway City Church v. Newsom* (2021) 592 U.S. __ [141 S.Ct. 1460]. Defendants did not brief the constitutionality of face coverings. And, while the opinion does seem to consider (and plainly rejects) a constitutionality argument regarding Defendants' failure to submit an SDP, the Defendants' argument regarding the unconstitutionality of the SDP also focused on its requirement that they agree not to hold indoor gatherings. Thus, on this record, the Court declines to apply collateral estoppel as a basis to grant summary adjudication for Plaintiffs.

Collateral estoppel is but one component of the doctrine of res judicata, which prohibits the relitigating of a cause of action litigated in a prior proceeding as a claim or defense in a subsequent proceeding involving the same parties or parties in privity with them. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Res judicata bars "not only the reopening of the original controversy, but also subsequent litigation of all issues which were or could have been raised in the original suit." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821.) Because the Court finds that the constitutionality of requiring face coverings and the SDP (separated from the indoor gathering requirement) were not fully addressed by Defendants during their appeal of the County Hearing Officer's ruling, the Court also finds res judicata not to be applicable to the present proceedings.[1]

2. The Public Health Orders Do Not Violate the First Amendment or Due Process Clause[2]

"The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see *Cantwell v. Connecticut* (1940) 310 U.S. 298, 303, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" (*Employment Div. v. Smith* (1989) 494 U.S.

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[1] Defendants also argue that the first and third causes of action are moot because the orders on which they are predicated have been rescinded. This argument is without merit because Plaintiffs are not seeking declaratory relief, and the finding that Defendants violated the Public Health Orders is necessary to the Court's determination of the fines under the first and third claims, which is still a live issue.

[2] Defendants concede that their Free Exercise and Equal Protection arguments rise and fall together. (Opp. at p. 14, fn. 1.)

872, 876-77, quoting U.S. Const., Amdt. 1.) "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." (*Id.*) "But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts...." (*Id.*; see also *Kennedy v. Bremerton Sch. Dist.* (2022) 142 S. Ct. 2407, 2422 ("The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." (internal citation and quotations omitted).)

However, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.'" (*Smith* 494 U.S. at 886, quoting (1940) *Minersville School Dist. Bd. of Ed. v. Gobitis* 310 U.S. 586, 594-595).

Accordingly, in *Reynolds v. United States* (1879) 98 U.S. 145, the court held that a criminal conviction for violating a statute prohibiting polygamy did not violate the Free Exercise Clause even though polygamy was a part of the defendant's sincerely held religious convictions. In so finding the court observed: "Can a man excuse his practices to the contrary [of the prohibition] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id.* at 166-167.

Similarly, in *Prince v. Massachusetts* (1944) 321 U.S. 158, the court found a statute prohibiting minors from selling or offering for sale "any newspapers, magazines, periodicals, or other articles of merchandise" on the streets did not violate the Free Exercise Clause when it was applied to a parent and child distributing Jehovah's Witness's literature, noting "neither rights of religion nor rights of parenthood are beyond limitation." (*Id.* at 166; see also *Smith*, 494 U.S. at 878-879 ("We have never held that an individual's religious beliefs excuse him

from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.")

Accordingly, United States Supreme Court cases "establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of Lukumi Babalu Aye v. City of Hialeah* (1992) 508 U.S. 520, 531.) Thus, the court held, for example, that an Oregon state law prohibiting sacramental peyote use and denial of unemployment benefits did not violate the Free Exercise Clause. (*Smith*, 494 U.S. 872.)

However, a "law [that] discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons", must withstand "the most rigorous of scrutiny." (*Church of Lukumi Babalu Aye*, 508 U.S. at 532; *Fulton v. City of Philadelphia* (2020) 592 U.S. __, [141 S. Ct. 1868, 1881].) Under this principle, the court "invalidated a state law that disqualified members of the clergy from holding certain public offices, because it 'impose[d] special disabilities on the basis of . . . religious status.'" (*Church of Lukumi Babalu Aye*, 508 U.S. at 532, quoting *McDaniel v. Paty* (1978) 435 U.S. 618.) Similarly, in *Fowler v. Rhode Island*, the court found an ordinance interpreted to prohibit Jehovah's Witness preaching in a public park but to permit preaching in a Catholic mass or Protestant church service was applied in an unconstitutional manner. (*Fowler v. Rhode Island* (1953) 345 U.S. 67; see also *Church of Lukumi Babalu Aye*, 508 U.S. 520 (law prohibiting animal sacrifice unconstitutional because targeted the Santeria religion).)

To determine neutrality of a particular law or government policy, the court is to begin by examining the text. (*Church of Lukumi Babalu Aye*, 508 U.S. at 533.) "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." (*Id.*) However, "[f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality.'" (*Id.*, quoting *Gillette v. United States* (1971) 401 U.S. 437, 452.) "The creation of a formal mechanism for granting exceptions

renders a policy not generally applicable [and thus not neutral], regardless of whether any exceptions have [actually] been given, because it "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude.'" (*Fulton*, 141 S. Ct. at 1871, quoting *Smith*, 494 U.S. at 884.) Such "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." (*Fulton*, 141 S. Ct. at 1881.)

Here, the face covering requirement imposed by the Public Health Orders applied to "all individuals, businesses, and other entities in the County" (See Plaintiffs' RJN, Exhibit 153 at § 2, Exhibit 154 at § 2 and Exhibit 156 at § 2) and thus were facially neutral, generally applicable requirements for all comparable, regulated entities in the County.

Defendants insist that the face covering requirements were nevertheless unconstitutional because various businesses, such as restaurants, personal care services, athletic activities, and youth programs, were "exempt" from both the mask and the social distancing requirements. (Opp. at pp. 11-12.) Defendants rely, in part, on the Declarations of William M. Shepherd and Barry Arata to support this contention. Mr. Shepherd explains that workers in his construction business, which he has owned since 2015, "removed their masks if it was impossible or unsafe to wear a mask to perform their job, as allowed by Santa Clara County's guidance for construction workers." (Shepherd Decl., ¶ 4.) Mr. Arata, a fire engineer in San Jose, explains that "even though the San Jose Fire Department required us to wear masks, most firefighters did not wear masks indoors." (Arata Decl., ¶ 3.) Mr. Arata also states that he never wore a mask during his 90-minute "intense cardio" work outs he engaged in with other firefighters. (Arata Decl., ¶ 2.) Mr. Shepard's examples appear to have been outside, and neither witness says anyone made a complaint with the County or that the County even knew about this absence of mask wearing. These statements therefore do not provide any evidence that *the County* was applying the Public Health Ordinances differently in these contexts than to Defendants; they merely demonstrate how these individuals were and were not following the Public Health Ordinances in their daily routines.

Defendants also argue the Public Health Orders were unconstitutional because "the County exempted government entities and their contractors *at their own discretion* from social distancing, wearing masks, or any other restriction to the extent that such requirements would impede or interfere with an essential government function. . ." (Opposition, p. 12 (emphasis in original; internal citations omitted).) Again, this is different than *Fulton*, for example, where *the government* was permitted to grant exceptions to some foster care providers, and the Supreme Court held the government therefore had to withstand strict scrutiny. Here, the County, operating on an emergency basis to take steps to prevent the spread of COVID-19, granted discretion to individuals to determine on a case by case basis whether their job might require them to remove their mask or get close to another person. The government was not engaging in an analysis to determine when an exception was warranted, and the default assumption was that face coverings were required to be worn.

Moreover, Defendants do not contend they sought or engaged in incidental or periodic exceptions to the mask requirements as the Public Health Orders allowed in certain circumstances, but rather, as evidenced from their conduct, Defendants unilaterally gave themselves a blanket exception for all of their activities at any time in any location, regardless of the number of attendees. Nor do Defendants submit any *evidence* to establish that any of the foregoing activities are comparable to Defendants' gatherings with respect to the risk of Covid-19 transmission. Defendants concede that they routinely held events where 300-600 people were in attendance—people who were not necessarily in regular contact with one another as was the case with the small number of Mr. Shephard's workers or the firefighters Mr. Arata worked with.

In addition, many of the businesses Defendants accuse of being "exempt" were subject to unique restrictions that were not applicable to gatherings like those that took place at the church, and the County's directive for gatherings specifically stated that food or drink could be served and face coverings could be removed for purposes of religious ceremony. (Defendants' RJN, Exhibits 4, 12, 13 and 22.) The Court previously noted Defendants' mischaracterization of many of the face covering and distancing requirements in its order on their demurrer to the

FAC and explained that it was "not accurate to portray restaurant patrons as being permitted to maintain social experiences completely unfettered and without *any* restriction as compared to church congregants." Defendants simply fail to demonstrate that the Public Health Orders treated *comparable* secular activities more favorably with respect to face coverings and SDP requirements.

Defendants' cited authorities are also distinguishable. There, comparisons were made (1) in the context of analyzing bans and capacity restrictions, which are not at issue here (see, *Tandon*, 141 S. Ct. at 1296), (2) at the preliminary injunction stage subject to a lower evidentiary standard (see *Roman Catholic Diocese*, 141 S. Ct. at 65-66), and (3) on completely different records (see *Calvary Chapel Daytona Valley* (9th Cir. 2020) 982 F.3d 1228, 1230-1231). It is also critical to note that in *Roman Catholic Diocese*, which Defendants rely heavily on in their Opposition,[3] the religious institutions that challenged the capacity limitations "rigorously implemented and adhered to all health protocols", and the capacity limitations were facially different for religious institutions than for nearly all other businesses. 141 S. Ct. at 67. In none of these prior cases was a religious institution challenging wearing face coverings. And, in none of these prior cases was a religious institution asking not to comply with Public Health Orders that were applicable to all other business, like the Defendants here and the parties in *Reynolds, Prince* and *Smith.*

However, even if the Court were to apply strict scrutiny to the County's orders regarding face coverings and SDP, the face covering and SDP requirements did not run afoul of the Free Exercise Clause. It is undisputed that the government interest in reducing the spread of Covid-19 is compelling, and requiring face coverings and an SDP were reasonable, unobtrusive means

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[3] Defendants emphasize the Ninth Circuit's observation that "The Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S. Ct. 63 (per curiam) arguably represented a seismic shift in Free Exercise law, and compels the result in this case." *Calvary Chapel Dayton Valley v Sisolak* (2020) 982 F.3d 1228, 1231. The Ninth Circuit does not explain what "seismic shift" it observed in that opinion—perhaps it referred to the application of strict scrutiny in the context of an emergency health order given its further observations in footnote 3. However, the fact remains that, like *Roman Catholic Diocese*, the Ninth Circuit was addressing strict and unevenly applied capacity restrictions, not a more narrowly tailored, generally applicable masking requirement.

of addressing that indisputable compelling government interest.[4] In fact, the United States Supreme Court recognized face coverings (and social distancing requirements) as a basic public health measure consistent with being able to conduct indoor religious worship and a "narrower option[]" than an outright ban on such gatherings. (*South Bay United Pentecostal Church v. Newsom* (2021) 592 U.S. __, 141 S. Ct. 716, 718-719; see also, e.g., *Gateway City Church v. Newsom* (2021) 592 U.S. __, 141 S. Ct. 1460, and *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 592 U.S. __, 141 S. Ct. 63.)

In *South Bay United Pentecostal Church v. Newsom*, which enjoined the County from enforcing a prohibition on indoor worship by order dated February 5, 2021, Justice Gorsuch's concurrence, which Justices Thomas and Alito joined, states:

> [California] insists that religious worship is so different that it demands especially onerous regulation. The State offers essentially four reasons why: (1) It says 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.
>
> No one before us disputes that factors like these may increase the risk of transmitting COVID-19. And no one need doubt that the State has a compelling interest in reducing that risk.

Justice Gorsuch goes on to chastise California for not considering less intrusive means—like masks and social distancing—than outright banning indoor worship:

> Nor, again, does California explain why the narrower options it thinks adequate in many secular settings—such as ***social distancing requirements***, ***masks***, cleaning, plexiglass barriers, and the like—cannot suffice here. Especially when those measures are in routine use in religious services across the country today. (emphasis added.)

Justice Gorsuch again raises the use of masks as a less restrictive means when fleshing out his "quibble" with the opinion regarding singing: "Once more, too, the State has not explained how a total ban on religious singing is narrowly tailored to its legitimate public health concerns. Even if a full congregation singing hymns is too risky, California does not explain

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[4] Because the Court finds the SDP and masking requirements constitutional even if strict scrutiny applies, Defendants' arguments regarding the California Constitution are unavailing. (See Opposition, p. 11.)

why even a single ***masked*** cantor cannot lead worship behind a ***mask*** and a plexiglass shield." (emphasis added.)

At argument, Defendant urged the Court not to be persuaded by these comments from the Justices, insisting that the fact that the United States Supreme Court mentioned masks and social distancing in its prior opinions does not mean those restrictions are constitutional under the First Amendment. While it is true that the Supreme Court was there focused on the ban on indoor gatherings, the court's references to masks and social distancing as less intrusive means plainly provide guidance for potential forms of protections that might pass constitutional muster, and Defendants do not dispute that they continued to refuse to enforce masking or social distancing requirements during church activities. From Defendants' perspective *any* protections the County sought to put into place to decrease the spread of COVID-19 between May 2020 and June 2021 that were applied to Calvary's religious services and activities would be unconstitutional. That is simply not the law. As the Supreme Court explained in a related context almost 80 years ago: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts* (1944) 321 U.S. 158, 166-67.

Because Plaintiffs have demonstrated that Defendants violated the Public Health Orders and thus committed a public nuisance, and Defendants have failed to demonstrate that those orders were unconstitutional, the Court finds that Plaintiffs are entitled to summary adjudication of their first and third causes of action.

3. The Fines Do Not Violate Due Process

Defendants assert that they received the November 9, 2020 NOV for the first time during discovery in this action and their rights were violated because it was never served on a proper party, i.e., one who was authorized to receive service on behalf of the church. The Court does not find this argument persuasive.

Plaintiffs proffer evidence demonstrating Defendants' counsel was served with the NOV only 8 days after its issuance, on November 17, and again on November 30, 2020. (See Supplemental Declaration of Jamila G. Benkato in Support of Reply ("Benkato Supp. Decl."),

¶¶ 7-13, 23.) The Due Process Clause only requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 306, 314.) The Urgency Ordinance, which is the relevant authority on this point and *not* state rules for service of summons or other court filings that Defendants cite in their opposition, authorized the County to serve NOVs by a variety of methods, including: personal service on a Responsible Party, posting the NOV conspicuously at the property entrance, or any other method "reasonably calculated to effectuate notice." (Plaintiffs' RJN, Exhibit 159, § 7(b).) A "Responsible Party" is defined to include an "agent" of the violating entity. (*Id.*, § 2(i).)

Here, the evidence submitted by the County establishes that it met these requirements. The November 9 NOV was conspicuously posted on the building and was also personally served on an agent of the church who had apparent authority to accept service by engaging in the following conduct: leading a prayer event at the church; letting people into the closed church building; allowing enforcement officers into church spaces; demanding legal authority for and granting permission to post notices; and verbally affirming that he had authority to accept service. (Benkato Supp. Decl., Exhibit 7, ¶ 23; Exhibit 10, ¶ 22; Exhibit 12 at _035052, 058; and Exhibit 13 at pp. 119:23-121:9.) Given the foregoing, the County has established that it reasonably served an agent of Defendants with the November 9 NOV.

Defendants further insist that their due process rights were violated because the County engaged in arbitrary and discriminatory enforcement of the Public Health Orders under the Urgency Ordinance, but they fail to establish as much with admissible evidence. (See Opp. at p. 18:1-11.) None of the NOVs Defendants cite demonstrate a deliberate singling out of the recipient entity, especially where one was for another church and others were issued months later under *different* protocols and the offending parties came into compliance after admitting wrongdoing. (See Benkato Supp. Decl., Exhibit 13 at pp. 128:25-130:2, 132:14-19, 139:6-16 and exs. 43, 57, 58; Exhibits 17 and 18.) Further, with regard to non-commercial activities, as Defendants own evidence demonstrates, the County received complaints about *both* secular and religious gatherings at private homes, and thus any difference in private versus business

enforcement strategies does not, by itself, show discriminatory enforcement against religious activities. (See Declaration of Moriah Gondeiro in Support of Defendants' Opposition to Motion for Summary Adjudication, ¶ 24, Exhibit 41.)

During argument, Defendants attempted to further clarify that the *amount* they were fined as compared to other entities demonstrates an unconstitutionally arbitrary enforcement, pointing out that other entities were fined for only a few days, at most. This argument ignores that the other entities promptly came into compliance with the rules and Defendants, through their own choices and actions, did not.

4. The Fines Do Not Violate the Eighth Amendment

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." (*United States v. Bajakjian* (1998) 524 U.S. 321, 334.) The Supreme Court sets out four considerations to determine proportionality: "(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 *Bajakjian* (19524 U.S. 321, 326). Under this analysis, the fines imposed for Defendants' repeated violations of the Public Health Orders are not unconstitutionally excessive.

First, Defendants' culpability is plain. Defendants were on notice of their violations of the County's Public Health Orders for many months, they encouraged others to violate those orders (PSU Nos. 18-19, 29, 37, 46; Benkato Decl., Exhibit 179 at pp. 141:5-142:5.), and they refused to come into compliance even in the face of knowing that church attendees had contracted Covid-19 and displayed symptoms of the virus (PSU Nos. 47, 48), and that the Academy had to be closed because of a major outbreak among students and teachers (PSU Nos. 49-51).

The relationship between the penalty and the harm is also plain. In all of Defendants' briefing and argument, they simply ignore that when their meetings, services and other activities ended, scores or sometimes hundreds of attendees would leave the church, fan out throughout the County and put at risk the physically vulnerable for whom contracting Covid-19 could mean

death. It should appear clear to all—regardless of religious affiliation—that wearing a mask while worshiping one's god and communing with other congregants is a simple, unobtrusive, giving way to protect others while still exercising your right to religious freedom. Unfortunately, Defendants repeatedly refused to model, much less, enforce this gesture. Instead, they repeatedly flouted their refusal to comply with the Public Health Orders and urged others to do so "who cares what the cost", including death.[5]

The cumulative fine amount Defendants now argue is excessive is solely the result of Defendants' own egregious conduct and election to continue violating Public Health Orders despite repeated efforts by the County to compel them to comply. Defendants cannot complain about the "cumulative size of the penalty" "when they had control over [the relevant time period] yet allowed the penalties to accumulate." (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1315-1316.)

Third, the fines imposed by the Urgency Ordinance are in line with similar ordinances enacted by other counties and with fines imposed by other County and state laws. (See RJN, Exhibit 177 at § 7.99.05(D), (F) [Marin County- fines up to $10,000 for Covid-19 violations by commercial entities, including fines that double daily up to that amount]; Exhibit 178 aat § VI(E) [Sonoma County- fines of $1,000 for a first violation, $5,000 for a second violation, and $10,000 for each additional violation for commercial entities]; Exhibit 176 at § 8.85.050(D)(2) [Napa County- fines of $5,000 for commercial activities]; Exhibit 175 at § 6 [San Mateo County- fines of up to $3,000 for each violation].) The Urgency Ordinance also comports with other Santa Clara County Ordinance Code provisions that impose similar fine amounts for a variety of violations. (See, e.g., Santa Clara County Ordinance Code §§ A1-37, A1-42(b)(2) [authorizing daily fines up to $5,000 for second and subsequent violations of, among other things, any code provision declaring a violation to be a public nuisance].)

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[5] Defendants argue the County cannot point to a single case of Covid-19 that came from Defendants' activities. Defendants ignore, however, that they refused to report any cases, and the easy spread and difficulty of contract tracing was part of the reasoning for the generally applicable face covering and social distancing requirements to begin with.

Finally, Defendants are indisputably able to pay the amounts owed; their revenues increased during the pandemic, and the Church received donations specifically for the purpose of paying the fines. (PSU No. 53.)

In their opposition, Defendants do not dispute their ability to pay the fines but instead endeavor to downplay their culpability by asserting they acted in good faith adherence with their sincerely held religious beliefs. (Opp. at p. 17:15.) But Defendants' religious beliefs did not give them carte blanche to regularly violate face covering and SDP requirements that were neutral and generally applicable to *all* comparable, regulated entities in the County, and otherwise enabled them to continue to conduct indoor religious worship as they desired. As the Supreme Court noted, such public health measures were "routine [] in religious services across the country" during the initial stages of the pandemic, and deemed permissible. (*South Bay United Pentecostal Church, supra,* 141 S. Ct. at 718-719 (Gorsuch, J., conc.).)

Although the Court finds that the fines do not violate the Eight Amendment, after careful study of the spreadsheet attached to the Benkato Declaration as Exhibit 191, the Court does find that certain of the fines should not be imposed for other reasons. First, certain of the fines related to the August 23, 2020 NOV have already been found to be unconstitutional, and the Court of Appeal therefore reversed imposition of those fines. The Court therefore finds it would be improper to impose those fines now.

Next, the Court agrees with Defendants that imposing fines for both failing to submit an SDP and to enforce mask wearing requirements is akin to fining Defendants for the same violation twice. The Court reaches this conclusion because according to Plaintiffs, the SDP required Defendants "to certify that [they] were taking protective measures including (1) training personnel about COVID-19, (2) instituting a process for reporting positive COVID-19 cases to the County, and (3) *agreeing to follow any applicable Public Health Orders, guidance or directives.*" (Plaintiff's Opening Brief, p. 8 (emphasis added), citing PRJN, Ex. 164, Cody Decl. ¶ 32.) Defendants concede they did not agree to and did not enforce the masking requirements imposed by the County. That refusal is already subsumed in the fine for refusing to submit and comply with a complete SDP, which required masking. Defendants further argue

that if any aspect of the SDP is found unconstitutional, then the entire fine for the SDP must be found unconstitutional, and that the masking fine should not be imposed daily because there is insufficient evidence in the record that Defendants failed to enforce masking requirements every single day, since inspections were not conducted every single day.

While the Court agrees that the refusal to enforce masking requirements can be considered covered by the refusal to submit an SDP[6] and the Court will therefore not impose separate fines for those violations, the Court disagrees with Defendants that the record is insufficient to demonstrate Defendants refused to comply with masking from November 9, 2020 through June 21, 2021. Defendants repeatedly announced their refusal to comply with masking requirements, never reported to the County that they had come into compliance with the masking requirement, and to this day maintain that they were never required to comply with that requirement at any time under any circumstances.

Looking only at the face covering fines from November 9, 2020 through June 21, 2021 (columns D and E in Exhibit 191 to the Benkato Declaration), and adding the 10% interest, the Court therefore finds the appropriate fine total to be $1,228,700.

Plaintiffs' motion for summary adjudication is accordingly GRANTED.[7]

IT IS SO ORDERED.

Date: April 7, 2023

The Honorable Evette D. Pennypacker
Judge of the Superior Court

[6] The Court need not address Defendants' other arguments regarding the SDP both because the Court is not imposing the fine for failure to submit an SDP and because Defendants have not individually challenged the various aspects of the SDP requirements.

[7] Defendants' Renewed Motion for Stay is denied. Most of the federal court action was dismissed and the rest stayed by an order in the federal action dated March 10, 2023, rendering Defendants' motion moot.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

FILED
APR 07 2023
Clerk of the Court
Superior Court of CA County of Santa Clara
BY D. CRISWELL DEPUTY

RE: **THE PEOPLE OF THE STATE OF CALIFORNIA et al vs CALVARY CHAPEL SAN JOSE et al**
Case Number: **20CV372285**

PROOF OF SERVICE

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION; DENYING DEFENDANT'S MOTION TO STAY was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on April 07, 2023. CLERK OF THE COURT, by David Criswell, Deputy.

cc: Robert Henry Tyler Advocates for FAith & Freedom 25026 Las Brisas Rd Murrieta CA 92562
Jamila G Benkato Office of the County Counsel 70 W Hedding Street East Wing 9th Floor San Jose CA 95110-1770