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7 **UNITED STATES DISTRICT COURT FOR THE**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 ABIDING PLACE MINISTRIES, a Church;
10 Plaintiff,

11 v.

12 WILMA J. WOOTEN, Public Health Officer
13 for San Diego County, in her official capacity;
14 the COUNTY OF SAN DIEGO; and DOES 1
15 through 100, inclusive,

16 Defendants.

CASE NO. **'20CV0683 BAS AHG**

**PLAINTIFF'S *EX PARTE* MOTION FOR
TEMPORARY RESTRAINING ORDER;
MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER;
[PROPOSED] TEMPORARY
RESTRAINING ORDER; CERTIFICATE
OF SERVICE**

17 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S**
18 **MOTION FOR TEMPORARY RESTRAINING ORDER**

19 **INTRODUCTION**

20 On April 8, 2020, the Public Health Officer for the County of San Diego promulgated and
21 caused to be served on the Plaintiff an order titled "Order of the Health Officer and Emergency
22 Regulations" promulgated by the Defendants on April 8, 2020 (hereinafter, the "Order," attached
23 to the Verified Complaint as Exhibit 1), which brings a sweeping ban on Assembly, and especially
24 Religious Assembly, that (1) exceeds statutory authority, (2) is unconstitutional on-its-face and
25 as applied, and (3) is arbitrary, unreasonable and oppressive.

26 The Plaintiff, which is a Church, suing on its own behalf and to protect the interest of its
27 members, respectfully asks this Court to issue a temporary restraining order to prevent irreparable
28 harm that would otherwise occur on Easter Sunday, April 12, 2020, through this unlawful Order.

1 They request that the Court restore the rights that the laws and the Constitution afford them,
2 protect their institution and their dignity, and enjoin this illegal and unconstitutional order.

3 At the outset of this memorandum, Plaintiff's Counsel asks the Court to take judicial
4 notice of the fact that Plaintiff and its counsel were made aware of this Order via e-mail at 6:19
5 p.m. on April 8, 2020, and due to the emergency and irreparable harm that would suffer from
6 allowing it to stand unchallenged, Plaintiff's Counsel has had to work through the night to prepare
7 this Verified Complaint and all other components of this Motion for a Temporary Restraining
8 Order.

9 **FACTUAL BACKGROUND**

10 As set forth in Plaintiff's Verified Complaint, Plaintiff ABIDING PLACE MINISTRIES
11 is a Church (Hereinafter, the "Church"), which was founded and duly organized under the laws
12 of the State of California on February 21, 1986, and has ever since assembled as a Church in San
13 Diego County on every Sunday, without exception. Furthermore, the Church holds real and
14 sincere religious beliefs that it must physically assemble in one place on the Lord's day,
15 commonly referred to as Sunday, and that failure to assemble is an unconscionable violation of
16 God's commands.

17 The Church is a small congregation, normally having less than one hundred (100) persons
18 at its Sunday meeting. The Church considers itself to be a family, and all its members work in
19 close proximity with all other members during the week, being employed in essential sectors on
20 their mission base and around the County.

21 In response to Covid-19, the Public Health Officer for the County of San Diego
22 promulgated the Order, after repeated efforts by the Church to find a way to hold an assembly
23 while advancing the Government's interests. The Church has made it clear that they only seek to
24 worship God freely but are willing to go to great lengths to enact measures that advance the
25 government interests reflected in the Order.

26 However, despite these efforts, the Public Health Officer for the County of San Diego,
27 and the County of San Diego, have informed the Church that if they assemble, no matter what
28 precautions they take, they will be in violation of the Order, and the Order will be enforced against

1 them, including misdemeanor charges, and possible arrest, fine and imprisonment. The Public
2 Health Officer and the County of San Diego have refused to meet with the Church to discuss
3 possible alternatives, and have refused to consider extreme social distancing measures that the
4 Church is willing to enact in order to uphold their supreme duty to obey God's command to
5 assemble.

6 This is a profound harm and goes to the heart of the First Amendment, as it is a prohibition
7 of the Free Exercise of Religion and an abridgement of the right to peacefully assemble. Not only
8 does the order impeded the Church's right to freely exercise their religion, on its face or as applied
9 it also seeks to shame the Church for seeking to act according to the dictates of their conscience.
10 It prevents the Church from conducting its assembly in any manner, and comes into effect and is
11 directed right at the most important assembly of the year: Resurrection Sunday, commonly
12 referred to as Easter, which is the anniversary of the resurrection of Jesus Christ, and a time where
13 the Church must assemble to rededicate their lives to God.

14 The Church has made three explicit proposals to the Public Health Officer, and a number
15 of ancillary proposals, including enforcing social distancing at its services, requiring congregants
16 to wear protective gear (including hazmat suits), assembling in vehicles, assembling by family
17 units spread out over a large area and not permitted to interact with any other family units. The
18 three specific proposals are attached to the Verified Complaint as Exhibits 3, 4 and 5. The Church
19 is not seeking to be allowed to meet in reckless disregard of the government's interest in slowing
20 the spread of Covid-19, but rather with the willingness to go to great lengths to comport with that
21 interest.

22 All other relevant facts and documentary exhibits are included with the Verified
23 Complaint, and concurrently filed with this motion. Suffice it to say, the Church is challenging
24 this Order now, which was sent to them via e-mail late yesterday evening (at 6:19 p.m. on April
25 8, 2020) because of the extraordinary harm that would result if a temporary restraining order does
26 not issue before this Sunday's service.

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1 **ARGUMENT**

2 To obtain a temporary restraining order (“TRO”) or a preliminary injunction, Plaintiff
3 must show that (1) it “is likely to succeed on the merits;” (2) it “is likely to suffer irreparable
4 harm in the absence of preliminary relief;” (3) “the balance of equities tips in [its] favor; and”
5 (4) “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7,
6 20 (2008). Plaintiff can show that his challenge readily rises to this standard.

7 **A. Plaintiffs are Likely to Succeed on the Merits of their Claims.**

8 **1. The Order violates the Health and Safety Code, because it exceeds the authority**
9 **given to the Public Health Officer under the sections of that code which are**
10 **cited to justify its existence.**

11 The order states that it is made by the Public Health Officer pursuant to Health and Safety
12 Code sections 101040, 120175, and 120175.5(b). However, a reading of those sections of that
13 Code shows that this type of order is far outside the scope of the authority given to the Public
14 Health Officer.

15 Code Section 101040 states, in relevant part: “(a) The local health officer may take any
16 preventative measure that may be necessary to protect and preserve the public from any public
17 health hazard during any... ‘state of emergency...’ (b) ‘Preventative measure’ means **abatement,**
18 **correction, removal or any other protective step that may be taken against any public health**
19 **hazard...**” (emphasis added). Abatement is governed by Health and Safety Code §§ 2060 –
20 2067, and requires notice of a public nuisance and direction to abate the nuisance within a
21 specified time. Correction and removal similarly require the existence of some readily defined
22 public health threat that can be corrected and removed and is provided for by statute. As
23 abatement, correction and removal are defined and limited by provisions of the Health and Safety
24 Code, and ordinarily exercised by a board of trustees, but in case of emergency allowed to be
25 exercised by the Public Health Officer, “other protective steps” must also be provided by statute.

26 Similarly, Code Section 120175 allows the Public Health Officer to take “measures...
27 necessary... to prevent...” Those are the same words as “preventative measure that may be
28 necessary,” which is already defined in Section 101040(b), and described above. Neither of these

1 two sections give the Public Health Officer the authority to promulgate countywide rules that
2 affect a vast number of persons who have had no exposure to disease at all.

3 Finally, then, we must look to section 120175.5(b), the last section cited, which states:
4 “...the local health officer may issue orders **to other governmental entities** within the local
5 health officer’s jurisdiction to take any action the local health officer deems necessary to control
6 the spread of communicable disease” (**emphasis added**). This section cannot be read to grant the
7 local health officer the authority to issue orders to every person in the County, which is the scope
8 of the order challenged in this motion.

9 Therefore, the Public Health Officer has exceeded the authority of the statutes given to
10 justify the Order, and the Order must be temporarily restrained.

11 **2. The Order, on its face or as applied, violates the First Amendment Free Exercise**
12 **and Assembly Clauses, and the Fifth Amendment Due Proess.**

13 *i. Free Exercise*

14 Neutral laws of general applicability can burden the Free Exercise Right only when they
15 are actually neutral, actually general, and do not implicate other fundamental Constitutional
16 rights. *See Employment Division v. Smith*, 494 U.S. 872 (1990). If they are not neutral, not general,
17 and/or implicate other fundamental Constitutional rights, then strict scrutiny applies, and the
18 government must show that its actions are narrowly tailored and the least restrictive means to
19 achieve a compelling objective. *Id.*; *See also, Sherbert v. Verner*, 374 U.S. 398 (1963).

20 The Order is not neutral because it singles out religious activity for special treatment.
21 While allowing every other category of essential activity to be conducted with the simple
22 requirements that they enact social distancing and increased sanitation standards, and having far
23 more than one-hundred-and-fifty (150) other categories of exemptions, the Order singles out
24 “faith based services” and only allows them to be provided “via streaming or other technology.”
25 That is not neutral.

26 The Order is not generally applicable because, as was just stated, there are over one-
27 hundred-and-fifty (150) broad categories of exemptions where gatherings are allowed with only
28 two restrictions: (1) the ability to enact social distancing, and (2) increased sanitation standards.

1 The Church has shown in its Verified Complaint, and the attached exhibits, that it can enact social
2 distancing and sanitation standards that go beyond what is required of any other business.

3 Even if the Order were neutral and generally applicable, which it is not, the Supreme Court
4 has held that “the First Amendment bars application of a neutral generally applicable law to
5 religiously motivated conduct... on the ground that... not the Free Exercise Clause alone, but that
6 Clause in conjunction with other constitutional protections.” *Employment Division v. Smith*,
7 *supra*, at 881. Here, as shown below, there are other constitutional protections implicated,
8 especially considering that the Order singles out “gatherings,” which in themselves are protected
9 by the Assembly Clause of the First Amendment, and Article I, §3(a) of the California
10 Constitution. That brings us back to the less restrictive means test announced set forth *Sherbert*.

11 Here, the Plaintiff has proposed several means that accomplish the government’s interest
12 and are less restrictive on their Constitutional Rights. As such, they are likely to succeed on the
13 merits.

14 *ii. Assembly*

15 The right of the citizens of the United States of America to peacefully assemble cannot be
16 abridged. And, the citizens of California have a right to freely assemble. This Order abridges that
17 right by prohibiting all “gatherings” or one or more people. While the Supreme Court has allowed
18 time, place and manner restrictions for gatherings on public property, it has held that those
19 restrictions must be (1) content neutral, (2) narrowly tailored, and (3) leave open “ample
20 alternative channels.” *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal
21 citations omitted).

22 Here, the prohibition on gathering is not content neutral, as the Order arbitrarily decides
23 what types of gatherings are “essential” and what type are “not essential,” and then arbitrarily
24 decides that “faith based” gatherings are “not essential,” without clearly declaring the standard
25 for that decision, and despite the fact that they should be entitled to a higher degree of protection
26 because of the First Amendment Free Exercise Clause.

27 Furthermore, the prohibition is not narrowly tailored, because it broadly bans all
28 “gatherings,” and does not provide a less restrictive alternative for “gatherings” that are able to

1 protect and advance the government’s interest through alternative means, as were proposed by
2 Plaintiff in this case. Furthermore, it broadly exempts over one-hundred-and-fifty (150) broad
3 bulleted categories of assemblies.

4 Finally, there is no alternative channel left open, as the ability to assemble for the purposes
5 of Church is completely prohibited, whether the assembly takes place on private property, in an
6 open field, or with all members confined to their vehicles. As set forth in the Verified Complaint,
7 the Public Health Officer was unwilling to consider any kind of alternatives to an outright ban on
8 the Church’s Assembly.

9 *iii. Due Process*

10 Finally, for the section on its unconstitutionality, this order is a violation of the Church’s
11 Fifth Amendment Right to Due Process.

12 Due to a scarcity of time, Counsel cannot fully brief this or the other issues preceding and
13 following this but asks the Court to look at the Verified Complaint and see that a number of Due
14 Process rights are implicated by this Order. Furthermore, when asked to meet with the Church
15 and its Pastor to discuss alternatives, the Public Health Officer and County Counsel outright
16 refused. There was no opportunity for a hearing before the deprivation of these rights, just an
17 impermissible executive fiat. Counsel wishes to remind the Court that public safety has always
18 been the justification for acts considered repugnant to the Constitution, including the incarceration
19 of an entire race in *Korematsu v. United States*, 323 U.S. 214 (1944) (overruled by dicta in *Trump*
20 *v. Hawaii*, 585 U.S. __ [2018]).

21 **3. The Order, on its face or as applied, is arbitrary, unreasonable and oppressive.**

22 Consider the following hypotheticals:

23 Under the Order, on its face or as applied, an individual who is asymptomatic, but a
24 potential Covid-19 carrier, who lives on one end of the County can travel across the County to
25 pick up an item in stock at a home improvement store on the other side of the County, stopping
26 to pick up food from a restaurant in one city, pumping gas at a fuel station and purchasing
27 refreshments from a convenience store in another, then gather at his relative’s house in even
28 another part of the County, and then return home, stopping at the grocery store on his way, and

1 although he has gathered and spread germs far and wide, he is not in violation of the Order,
2 because all of his activities are exempted from the order even though none of his activities are
3 explicitly protected by the Constitution.

4 Under the Order, on its face or as applied, another man who is asymptomatic, but a
5 potential Covid-19 carrier, can drop his clothes off at a public laundromat in the morning, go to
6 work at an “essential” job selling cannabis at a cannabis retail distributor, alongside coworkers
7 from other parts of the County, interacting with germs from a large number of customers arriving
8 from different parts of the County, and then go for a walk in a public park near his home, before
9 returning to the public laundromat, picking up and spreading germs at all of these places, and he
10 is not in violation of the Order, because all of his activities are exempted from the order even
11 though none of his activities are explicitly protected by the Constitution.

12 Under the Order, on its face or as applied, an individual who is asymptomatic, but a
13 potential Covid-19 carrier, can take public transportation around the County, go to a group therapy
14 session, stop on her way home to donate blood, drop a prescription off at a pharmacy, step into a
15 bank to open a new account, stop off at the post office to mail a package, and then start a job
16 providing cleaning services to houses all around the County, picking up and spreading germs at
17 all of these places, and she is not in violation of the Order, because all of her activities are
18 exempted from the order even though none of her activities are explicitly protected by the
19 Constitution.

20 However, a woman who otherwise remains in her home cannot exercise her
21 Constitutionally protected right to Free Exercise of Religion by attending Church (as demanded
22 by her conscience), even if she maintains the strictest standards of social distancing and
23 sanitization, including remaining in her vehicle during Church, or wearing a hazmat suit, and
24 spreading her germs as little as possible.

25 **B. The Church is likely to suffer irreparable harm unless a temporary restraining order**
26 **is issued as quickly as possible.**

27 Resurrection Sunday, commonly referred to as “Easter,” only happens once per year, and
28 is considered the most important Assembly date by the Church. Unless a temporary restraining

1 order is issued, the Church's Constitutional Right to Assemble and Freely Exercise their Religion
2 will be violated, by an executive order that provides little notice and no possible alternatives.
3 Among other things, the Order will hurt the Church and its members, prevent or disrupt them
4 from acting according to the dictates of their conscience, not allow them to go to extraordinary
5 lengths to protect the public interest in the exercise of the dictates of their conscience, interfere
6 with a High Holy Day, Holy Convocation, and Sacred Ceremony when there are several less
7 restrictive means of achieving the government's interest, and allow an unlawful, overbroad, vague
8 and excessive administrative action to be enforced against the highest form of Constitutionally
9 protected activities.

10 These harms cannot be remedied through damages.

11 **C. The balance of equities weighs in the Church's favor because they have gone to great**
12 **lengths trying to work out a solution with the County before being forced into**
13 **seeking this temporary restraining order.**

14 The Church has done everything possible to avoid having to seek a temporary restraining
15 order, even being willing to allow the County Health Officer to place any manner of restrictions
16 on their assembly, and mere days before the planned Assembly, in the late evening hours, when
17 any chance of relief was almost entirely extinguished, the County Health Officer promulgated a
18 new order that seems to have been crafted as a response to the Church's proposals. Where the
19 Church proposed to meet in socially distanced family units of less than ten (10), in accordance
20 with the Public Health Officer's prior order, the Public Health Officer reduced the number
21 allowed in a gathering to one. Where the Church proposed to meet in vehicles, the Public Health
22 Officer explicitly forbade meetings in vehicles.

23 While this might be coincidental, it does not change the fact that the Church has gone to
24 extraordinary lengths, including extended negotiations with the Sheriff's Office prior to receiving
25 their first communication from the Public Health Officer.

26 And, on top of all of that, the Public Health Officer is likely overstepping her authority as
27 provided by the statutes she cites justifying the Order, and the Church is seeking to uphold the
28 highest type of constitutional right, two explicitly protected rights.

D. An injunction is in the public interest because it upholds the rights protected by the Constitution and prevents an unconstitutional and unlawful overreach by a Public Health Officer.

“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And, the Government’s interest in slowing the spread of Covid-19 can be achieved through the same types of restrictions placed on other businesses and activities they exempt – businesses and activities that include “gatherings,” but are by and large not otherwise protected by the Constitution.

CONCLUSION

For the foregoing reasons, and others that should be obvious to the Court and flow as the natural and apparent out currents from the foregoing reasons, the Court should grant Plaintiff’s application for a temporary restraining order.

Respectfully Submitted,

DATED: 4/9/20
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