Sir Thomas More

Sir Thomas More

Thomas More Society celebrates the life of its namesake, Sir Thomas More, the patron saint of attorneys, statesmen and politicians.

Sir Thomas was an English lawyer who served as chancellor of England from 1529 to 1533. King Henry VIII sought the approval of Sir Thomas for the King's self-appointment to be the head of the Church of England because of his obsession with finding a male heir to his throne, thereby divorcing his rightful wife, Catherine, for another, Anne Boleyn. In good conscience, Sir Thomas could not support either of these actions, so he refused to sign the Act of Succession and also resigned as chancellor. What Sir Thomas had not counted on was the deceit and betrayal of those craving power at his expense thereby causing Sir Thomas's famous quote to ring true, "When statesmen forsake their own

private consciences for the sake of their public duties, they lead their country by a short route to chaos." For adhering to his principles, Sir Thomas was jailed, tried, and sentenced to death while hundreds of noblemen and clergy stood by the King to save their own heads.

Even until his death (in 1535) he gave witness to the priority of his loyalty as his last recorded words testify: "I am the King's good servant – but God's first." In 1935, Thomas More was canonized and proclaimed a saint of the universal Catholic Church by Pope Pius XI. In our time, St. Thomas More fittingly models peaceful and stalwart adherence to principles for all pro-life activists and those called to defend them.

A Lawyer's Prayer to St. Thomas More*

I pray, for the glory of God and in the pursuit of His justice, that I, with You, St. Thomas More, may be trustworthy with confidences, keen in study, accurate in analysis, correct in conclusion, able in argument, loyal to clients, honest with all, courteous to adversaries, ever attentive to conscience. Sit with me at my desk and listen with me to my clients' tales. Read with me in my library and stand always beside me so that today I shall not, to win a point, lose my soul.

Pray for me, and with me, that my family may find in me what Your family found in You: friendship and courage, cheerfulness and charity, diligence in duties, counsel in adversity, patience in pain—their good servant, but God's first. Amen.

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201 U.S. 43 (1906)

See highlighted section on page 8-9 of the case (10-11 of the PDF) for quote included in the message.

HALE
v.
HENKEL.

No. 340.

Supreme Court of United States.

Argued January 4, 5, 1906.

Decided March 12, 1906.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

47*47 *Mr. De Lancey Nicoll,* with whom *Mr. Junius Parker* and *Mr. John D. Lindsay* were on the brief, for appellant in this case and in No. 341 argued simultaneously herewith.[1]

Mr. Henry W. Taft, Special Assistant to The Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy,* Special Assistant to The Attorney General, were on the brief, for the United States in this case and in No. 341.

[201 U.S. 43, 44] This was an appeal from a final order of the circuit court, made June 18, 1905, dismissing a writ of habeas corpus, and remanding the petitioner, Hale, to the custody of the marshal.

The proceeding originated in a subpoena duces tecum, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to 'testify and give evidence [201 U.S. 43, 45] in a certain action now pending . . . in the circuit court of the United States for the southern district of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States, and that you bring with you and produce at the time and place aforesaid:'

1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts, or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States, and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpoena, and, before being sworn, asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information, or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the circuit court, as stated in the subpoena, and that the grand jury was investigating no specific charge against [201 U.S. 43, 46] anyone, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence, and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its

officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the assistant district attorney that this was a proceeding under the Sherman act to protect trade and commerce against unlawful restraint and monopolies; that, under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions. He also declined to produce the papers and documents called for in the subpoena:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed. Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpoena. Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the circuit judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of habeas corpus was thereupon sued out, and a hearing had before another judge of the same court, who discharged the writ and remanded the petitioner.

58*58 MR. JUSTICE BROWN, after making the foregoing statement, delivered the opinion of the court.

Two issues are presented by the record in this case, which are so far distinct as to require separate consideration. They depend upon the applicability of different provisions of the Constitution, and, in determining the question of affirmance or reversal, should not be confounded. The first of these involves the immunity of the witness from oral examination; the second, the legality of his action in refusing to produce the documents called for by the *subpoena duces tecum.*

1. The appellant justifies his action in refusing to answer the 59*59 questions propounded to him, 1st, upon the ground that there was no specific "charge" pending before the grand jury against any particular person; 2d, that the answers would tend to criminate him.

The first objection requires a definition of the word "charge" as used in this connection, which it is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and it is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the district attorney, which is of no legal value in prosecutions for felony; or by a presentment usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony. If another kind of charge be contemplated, when and by whom must it be preferred? Must it be in writing and if so, in what form? Or may it be oral? The suggestion of the witness that he should be furnished with a copy of such charge, if applicable to him is applicable to other witnesses summoned before the grand jury. Indeed, it is a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room.

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.

We are pointed to no case, however, holding that a grand jury 60*60 cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Rex* v. *Shaftsbury,* 8 Howell's State Trials, 759, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given to you in charge, *as of all other matters, and things as shall come to your own knowledge* touching this present service," etc. This oath has remained substantially unchanged to the present day. There was a difference, too, in the

nomenclature of the two cases of accusations by private persons and upon their own knowledge. In the former case their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment. Says Blackstone in his Commentaries, Book IV, page 301:

"A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Substantially the same language is used in 1 Chitty Crim. Law, 162.

In *United States* v. *Hill,* 1 Brock. 156, it was indicated by Chief Justice Marshall that a presentment and indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.

In a case arising in Tennessee the grand jury, without the agency of the district attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition. Mr. Justice Catron sustained the legality of the proceeding and compelled the witnesses 61*61 to answer. His opinion is reported in Wharton's Criminal Pleading and Practice, 8th ed. § 337. He says: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime." His charge contains a thorough discussion of the whole subject.

While presentments have largely fallen into disuse in this country, the practice of grand juries acting upon notice, either of their own knowledge or upon information obtained by them, and incorporating their findings in an indictment, still largely obtains. Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of public prosecutions carried on by officers of the State appointed for that purpose, has been entirely settled since the adoption of the Constitution. In a lecture delivered by Mr. Justice Wilson of this court, who may be assumed to have known the current practice, before the students of the University of Pennsylvania, he says (Wilson's Works, vol. II, page 213):

"It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and 62*62 by accusers, marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.

"The oath of a grand juryman — and his oath is the commission under which he acts — assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Similar language was used by Judge Addison, President of the Court of Common Pleas, in charging the grand jury at the session of the Common Pleas Court in 1791 (Addison's Pa. Rep. Appx. p. 38):

"If the grand jury, *of their own knowledge,* or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the State, of the nature of the offense, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The practice then prevailing, with regard to the duty of grand juries, shows that a presentment may be based not only upon their own personal knowledge, but from the examination of witnesses.

While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them. An analysis of cases approving of this method of procedure would unduly burden this opinion, but the following are the leading ones upon the subject: *Ward* v. *State,* 2 Missouri, 120; *State* v. *Terry,* 30 Missouri, 368; *Ex* 63*63 *parte Brown,* 72 Missouri, 83; *Commonwealth* v. *Smyth,* 11 Cushing, 473; *State* v. *Wolcott,* 21 Connecticut, 272, 280; *State* v. *Magrath,* 44 N.J.L. 227; Thompson & Merriam on Juries, §§ 615-617. In *Blaney* v. *Maryland,* 74 Maryland, 153, the court said:

"However restricted the functions of the grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders though no preliminary proceedings have been had before a magistrate, and though neither the court not the state's attorney has laid the matter before them."

The rulings of the inferior Federal courts are to the same effect. Mr. Justice Field, in charging a grand jury in California (2 Sawy. 667), said to the grand jury acting upon their own knowledge:

"Not by rumors or reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury."

Similar language was used in *United States* v. *Kimball,* 117 Fed. Rep. 156, 161; *United States* v. *Reed,* 2 Blatch. 435, 449; *United States* v. *Terry,* 39 Fed. Rep. 355. And in *Frisbie* v. *United States,* 157 U.S. 160, it is said by Mr. Justice Brewer:

"But in this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment."

There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view and in a spirit of meddlesome inquiry. In the most pertinent of these cases, *In re Lester,* 77 Georgia, 143, the Mayor of Savannah, who was also *ex* 64*64 *officio* the presiding judge of a court of record, was called upon to bring into the Superior Court the "Information Docket" of his court, to be used as evidence by the State in certain cases pending before the grand jury. It was held "that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well defined limits. . . . The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense."

This case is readily distinguishable from the one under consideration, in the fact that the subpoena in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company; and that the Georgia Penal Code prescribed a form of oath for the grand jury, "that the evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be, here state the case), shall be the truth," etc. This seems to confine the witness to a charge already laid before the jury.

In *Lewis* v. *Board of Commissioners,* 74 N. Car. 194, the English practice, which requires a preliminary investigation where the accused can confront the accuser and witnesses with testimony, was adopted as more consonant to principles of justice and personal liberty. It was further said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal courts has been quite the contrary.

Other cases lay down the principle that it must be made to appear to the grand jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered. *In Matter of Morse,* 18 N.Y. Criminal Rep. 312; *State* v. *Adams,* 70 Tennessee, 647 (an unimportant case, turning upon a local statute). In Pennsylvania grand juries are somewhat more restricted in their powers than is usual in other States, *McCullough* v. *Commonwealth,* 67 Pa. St. 65*65 30; *Rowand* v. *Commonwealth,* 82 Pa. St. 405; *Commonwealth* v. *Green,* 126 Pa. St. 531, and in Tennessee inquisitorial powers are granted in certain cases and withheld in others. *State* v. *Adams, supra; State* v. *Smith,* Meigs, 99.

We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations 66*66 or upon the evidence of witnesses given before them.

2. Appellant also invokes the protection of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself.

The answer to this is found in a proviso to the General Appropriation Act of February 25, 1903, 32 Stat. 854, 904, that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the Anti Trust Law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used by courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. *Yates* v. *The Queen,* 14 Q.B.D. 648; *Hogan* v. *State,* 30 Wisconsin, 428.

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose 67*67 him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself — in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal, but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the Amendment ceases to apply. The extent of this immunity was fully considered by this court in *Counselman* v. *Hitchcock,* 142 U.S. 547, in which the immunity offered by Rev. Stat. section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the

act of February 25, 1903, above quoted. This act was declared by this court in *Brown* v. *Walker,* 161 U.S. 591, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman* v. *Hitchcock,* p. 586, that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional Amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost 68*68 any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown* v. *Walker,* both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas,* 199 U.S. 372, namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that 69*69 the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a dangerous unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes,* 1 B. & S. 311; *King of the Two Sicilies* v. *Willcox,* 7 State Trials (N.S.), 1049, 1068; *State* v. *March,* 1 Jones (N. Car.), 526; *State* v. *Thomas,* 98 N. Car. 599.

The case of *United States* v. *Saline Bank,* 1 Pet. 100, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction.

But it is further insisted that while the immunity statute may protect individual witnesses it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even 70*70 though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this Amendment really does not arise, except perhaps where a corporation

is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes. The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself,* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employee, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the non-production by the witness of the books and papers called for by the *subpoena duces tecum.* The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and, finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth with technical accuracy the real reason 71*71 for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the Fourth Amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The construction of this amendment was exhaustively considered in the case of *Boyd* v. *United States,* 116 U.S. 616, which was an information *in rem* against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under section 5 of the act of June 22, 1874, directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (p. 622) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that Amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal (p. 634), "is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the Fourth Amendment.

72*72 Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions. Thus in the case of *Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447, the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Courts to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams* v. *New York,* 192 U.S. 585, which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission, as

evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that "If a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these Amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to 73*73 render invalid legislation or judicial procedure having such effect."

The *Boyd* case must also be read in connection with the still later case of *Interstate Commerce Commission* v. *Baird,* 194 U.S. 25, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the *Boyd case* was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley,* 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey* v. *Long,* 9 East, 473; *Bull* v. *Loveland,* 74*74 10 Pick. 9; *U.S. Express Co.* v. *Henderson,* 69 Iowa, 40; Greenleaf on Evidence, 469*a.*

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to 75*75 act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a

corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

4. Although, for the reasons above stated, we are of the 76*76 opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company* v. *Ellis,* 165 U.S. 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search of ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case,* the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum,* against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, 77*77 as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown,* 72 Missouri, 83; *Shaftsbury* v. *Arrowsmith,* 4 Ves. 66; *Lee* v. *Angas,* L.R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

But this objection to the subpoena does not go to the validity of the order remanding the petitioner, which is, therefore,

Affirmed.

MR. JUSTICE HARLAN, concurring.

I concur entirely in what is said in the opinion of the court 78*78 in reference to the powers and functions of the grand jury and as to the scope of the Fifth Amendment to the Constitution. I concur also in the affirmance of the judgment, but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpoena duces tecum* was an infringement of the Fourth Amendment, which declares that "the right of the *People* to be secure in their *persons,* houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized." It may be, I am inclined to think as a matter of procedure and practice, that the *subpoena duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness — whose personal rights, let it be observed, were in no wise involved in the pending inquiry — to refuse compliance with the subpoena, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti Trust Act, was the subject of examination. It was not his privilege to stand between the corporation and the Government in the investigation before the grand jury. In my opinion, a corporation — "an artificial being, invisible, intangible and existing only in contemplation of law" — cannot claim the immunity given by the Fourth Amendment; for, it is not a part of the "People," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. If a contrary view obtains, the power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury 79*79 proceeding in its work under the orders of the court, can plead the immunity given by the Fourth Amendment against unreasonable searches and seizures, may it not equally rely upon that Amendment to protect it even against a statute authorizing or directing the examination by the agents of the Government creating it, of its papers, documents and records, unless they specify the particular papers, documents and records to be examined? If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an act of Congress? Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment. In my judgment when a grand jury seeking, in the discharge of its public duties, to ascertain whether a corporation has violated the law in any particular, requires the production of the books, papers and records of such corporation, no officer of that corporation can rightfully refuse, when ordered to do so by the court, to produce such books, papers and records in his official custody, upon the ground simply that the order was, as to the corporation, an unreasonable search and seizure within the meaning of the Fourth Amendment.

MR. JUSTICE McKENNA, also concurring.

I concur in the judgment but not in all the propositions declared by the court. I think the subpoena is sufficiently definite. The charge pending was a violation of the Anti Trust Act of 1890. The documents and papers sought were the understandings and agreements of the accused companies. That the documents commanded were many or evidenced transactions occurring through a period of time are not circumstances fatal to the validity of the subpoena. If there was a violation of the Anti Trust Act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced or its transactions alluded to in telegrams 80*80 and letters sent during the time the combination operated. Each telegram, each letter, would contribute proof, and therefore material testimony. Why then should they not be produced? What answer is given? It is said the subpoena is tantamount to requiring all the books, papers and documents found in the office of the MacAndrews &

Forbes Company, and an embarrassment is conjectured as a result to its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpoena. If such consequences could be granted they are not fatal to the subpoena. But they may be denied. There can be at most but a temporary use of the books, and this can be accommodated to the convenience of parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties or subject them to more inconvenience than the demands of justice may require.

I cannot think that the consequences mentioned are important or necessary to the argument. A more serious matter is the application of the Fourth Amendment of the Constitution of the United States.

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more direct and plain; nothing more expressive to distinguish a subpoena from a search warrant. Can a subpoena lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done — not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves — may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party — is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of the 81*81 law, and it is all that can be allowed without serious embarrassment to the administration of justice. Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable or are sacrifices which the law may not demand.

However, I may apprehend consequences that the opinion does not intend. It seems to be admitted that many, if not all, of the documents may ultimately be required, but it is said "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for their production." This intimates a different objection to the order of the court than the generality of the subpoena, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it. The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of a grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised.

But what does the record show? It shows that Hale refused to give the testimony that, this court says, should have preceded the order under review. He refused to answer what the business of the MacAndrew & Forbes Company was or where its office was, or whether there was an agreement with the company and the American Tobacco Company in regard to the products of their respective businesses or whether the company he represented sold its products throughout the United States. The ground of refusal was that there was no legal warrant or authority for his examination, not that the documents or testimony 82*82 was not material or not shown to be material. Besides, after objection made to the laying of a foundation, complaint cannot be made that no foundation was laid. And it seems to be an afterthought in the proceedings on *habeas corpus* that the ground objection to examination did not exclusively refer to the want of power in the grand jury.

By virtue of its dominion over interstate commerce Congress has power, the opinion of the court asserts, over corporations engaged in that commerce. And the power is the same as if the corporations had been created by Congress. And yet it is said to be a power subject to the limitation of the Fourth Amendment. To this I am not prepared to assent. I have already pointed out the essential distinction between a *subpoena duces tecum* and a search warrant, and, it may be, the case at bar demands from me no expression of opinion of the Fourth Amendment. And I am mindful, too, of the reservation in the opinion of the court of the power of Congress to require by direct legislation the fullest disclosures of their affairs from corporations engaged in interstate commerce. While recognizing this may be true, and, that until such power is exercised, there may be reasons for holding that corporations are entitled to the protection of the Fourth Amendment, there are reasons against the contention, and I wish to guard against any action which would preclude against their consideration in cases where the Fourth Amendment may be a more

determining factor than it is in the case at bar. There are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment. The protection of both Amendments, it can be contended, is against the compulsory production of evidence to be used in criminal trials. Such warrants are used in aid of public prosecutions (Cooley Constitutional Lim. 6th ed. 364), and in *Boyd* v. *United States,* 116 U.S. 616, a relation between the Fourth Amendment and the Fifth Amendment was declared. It was said the Amendments throw great light on each other, "for the `unreasonable searches and seizures' condemned 83*83 in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man `in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an `unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the Fourth Amendment receives illumination from the Fifth, or, to express the idea differently, if the Amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable conclusion, that if corporations have not such immunity they can no more claim the protection of the Fourth Amendment than they can of the Fifth.

MR. JUSTICE BREWER, with whom the CHIEF JUSTICE concurred, dissenting.

With what is said in the opinion of the court of the necessity of a "charge," with the proposition that the immunity granted by the Federal statute is sufficient protection against both the Nation and the several States, with the holding that the protection accorded by the Fifth Amendment to the Constitution is personal to the individual and does not, extend to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal, and also that the *subpoena duces tecum* cannot be sustained, I fully agree.

Further, I desire to emphasize certain truths which in this and other cases decided to-day seem to be ignored or depreciated. The immunities and protection of articles 4, 5 and 14 84*84 of the Amendments to the Federal Constitution are available to a corporation so far as in the nature of things they are applicable. Its property may not be taken for public use without just compensation. It cannot be subjected to unreasonable searches and seizures. It cannot be deprived of life or property without due process of law.

It may be well to compare the words of description in articles 4 and 5 with those in article 14:

"Article 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Article 5. No person . . . shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Article 14. . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Santa Clara County* v. *Southern Pacific Railroad,* 118 U.S. 394, 396, Mr. Chief Justice Waite said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

See also *Pembina Mining Company* v. *Pennsylvania,* 125 U.S. 181; *Missouri Pacific Railway Company* v. *Mackey,* 127 U.S. 205; *Minneapolis & St. Louis Railway Company* v. *Beckwith,* 129 U.S. 26; *Charlotte &c. Railroad* v. *Gibbes,* 142 U.S. 386; *Monongahela Navigation Company* v. *United States,* 148 U.S. 312; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U.S. 150, 154, 85*85 and cases cited; *Chicago, Burlington & Quincy Railroad Company* v. *Chicago,* 166 U.S. 226.

These decisions were under the Fourteenth Amendment, but if the word "person" in that Amendment includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments.

By the Fourth Amendment the "people" are guaranteed protection against unreasonable searches and seizures. "Citizens" is a descriptive word; no broader, to say the least, than "people."

As repeatedly held, a corporation is a citizen of a State for purposes of jurisdiction of Federal courts, and, as a citizen, it may locate mining claims under the laws of the United States, *McKinley* v. *Wheeler,* 130 U.S. 630, and is entitled to the benefit of the Indian Depredation Acts. *United States* v. *North-western Express Company,* 164 U.S. 686. Indeed, it is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall in *Providence Bank* v. *Billings,* 4 Pet. 514, 562: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

United States v. *Amedy,* 11 Wheat. 392, was the case of an indictment under an act of Congress for destroying a vessel with intent to prejudice the underwriters. The act of Congress declared that "if any person shall . . . willfully and corruptly cast away . . . any ship or vessel . . . with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy," etc. The indictment charged an intent to defraud an incorporated insurance company, and the court held that a corporation is a person within the meaning of the act, saying (p. 412):

"The mischief intended to be reached by the statute is the 86*86 same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. c. 7, respecting the erection of cottages, where the word used is, `no person shall,' etc., says, `this extends as well to persons politic and incorporate, as to natural persons whatsoever.'"

Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the Amendments. The corporation of which the petitioner was an officer was chartered by a State, and over it the General Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either Amendment.

It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

In Angell & Ames on Corporations, 9th ed. c. 19, §§ 684, 685, the authors say:

"To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the Government itself, through the medium of the courts of justice; but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.

87*87 "In this country, where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which at common law would cause a forfeiture of their charters."

The matter is discussed in Blackstone's Commentaries, in par. 3, chap. 18, Book I, and he says:

"I proceed, therefore, next to inquire how these corporations may be visited. For corporations, being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil or eleemosynary."

And in respect to civil corporations he adds, same paragraph and chapter (*782):

"The law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in His Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority."

In 2 Kent, *300, the author says: "The visitation of civil corporations is by the Government itself, through the medium of the courts of justice."

In *Amherst Academy* v. *Cowls,* 6 Pick. 427, 433, it was held that:

"Without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters." The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and 88*88 compelled to regulate its actions according to the judgments — perhaps the conflicting judgments — of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States. *Boyd* v. *United States,* 116 U.S. 616, arose under the Revenue Acts, and the applicability of the Fourth and Fifth Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the Fourth and Fifth Amendments is discussed, their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. I quote his words (p. 635):

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Finally, as the *subpoena duces tecum* was the initiatory step in the proceedings before the grand jury against this petitioner, 89*89 as that is the major fact in those proceedings, and as it is agreed that it is not sustainable, it seems to me that the order adjudicating him in contempt should be set aside, and this notwithstanding that subsequently he improperly refused to answer certain questions.

The case is not parallel to that of an indictment in two counts upon which a general judgment is entered, and one of which counts is held good and the other bad, for a writ of *habeas corpus* is not a writ of error, and the order to be entered thereon is for a discharge or a remand to custody. If a discharge is ordered no punishment can be inflicted under the judgment as rendered, and if a new prosecution is instituted containing the good count a plea of former conviction will be a full defense. But in the case at bar an order for a discharge will have no such result. The *habeas corpus* statute, Rev. Stat., § 761, provides that "the court, or justice, or judge shall proceed in a summary way . . . to dispose of the party as law and justice require." Justice requires that he should not be subjected to the costs of this *habeas corpus* proceeding, or be punished for contempt when he was fully justified in disregarding the principal demand made upon him.

The order of the Circuit Court should be reversed and the case remanded with instructions to discharge the petitioner, leaving to the grand jury the right to initiate new proceedings not subject to the objections to this.

I am authorized to say that the CHIEF JUSTICE concurs in these views.

[1] McAlister *v.* Henkel, *post,* p. 90.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – NORTH CENTRAL DISTRICT

GRACE COMMUNITY CHURCH OF THE VALLEY, a California nonprofit corporation; and PASTOR JOHN MACARTHUR, in his official capacity as representative of the Grace Community Church Board of Elders, Plaintiffs, v. GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; SANDRA SHEWRY, in her official capacity as Acting	Case No.: **IMAGED FILE** **COMPLAINT FOR** (1) Violation of California Constitution's Guarantees of Free Exercise and Enjoyment of Religion without Discrimination or Preference (Cal. Const., art. I, § 4); (2) Violation of California Constitution's Liberty and Due

California Department of Public Health Director; ERICA PAN, in her official capacity as Acting California Public Health Officer; BARBARA FERRER, in her official capacity as Public Health Director of the County of Los Angeles; ALEJANDRO VILLANUEVA, in his official capacity as Sheriff of the County of Los Angeles; MUNTU DAVIS, in his official capacity as Public Health Officer of the County of Los Angeles; ERIC GARCETTI, in his official capacity as Mayor of the City of Los Angeles; MICHEL MOORE, in his official capacity as Chief of Police for the City of Los Angeles Police Department; and DOES 1–10, inclusive,

Defendants.

Process Guarantees (Cal. Const., art. I, §§ 1, 7);

(3) Violation of California Constitution's Guarantees of Liberty of Speech (Cal. Const., art. I, § 2);

(4) Violation of California Constitution's Equal Protection Guarantees (Cal. Const., art. I, § 7).

(5) Violation of California Constitution's Separation of Powers Guarantees: Non-Delegation Doctrine (Cal. Const., art. III, § 3.)

(6) Violation of California Constitution's Separation of Powers Guarantees: Ban on Legislative Vetoes (Cal. Const., art. III, § 3.)

JURY TRIAL DEMANDED

The Governor may respond that his order forbids only indoor worship but still allows people of faith to worship outdoors. But whether health experts would endorse that dichotomy—and whether the First Amendment permits it—is far from obvious. . . . Under his logic, the Governor would allow tens of thousands of LSU fans to assemble this fall under the open sky at Tiger Stadium, while forbidding countless others from cheering on the Saints under the Superdome.

(*Spell v. Edwards* (5th Cir. 2020) 962 F.3d 175, 182 & n.6 [Ho., J., concurring].)

INTRODUCTION

1. For nearly 150 years, courts have recognized the old adage that, "Even a dog distinguishes between being stumbled over and being kicked." (HOLMES, THE COMMON LAW 3 (1881).) More recently, this adage was constitutionalized when the Supreme Court held that, "[j]ust as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter . . . whether [government action is] . . . motivated by sectarianism, or whether it lacks a history demonstrating that purpose." (*McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.* (2005) 545 U.S. 844, 866 n.14.)

2. Here, the American people have begun to see that they are being "kicked" by their own government. They have witnessed how the onerous restrictions imposed on them by public officials to allegedly fight the COVID-19 pandemic simply do not apply to certain, favored groups. When many went to the streets to engage in "political" or "peaceful" protests purportedly against racism and police brutality, these protestors refused to comply with the pandemic restrictions. Instead of enforcing the public health orders, public officials were all too eager to grant a *de facto* exception for these favored protestors.

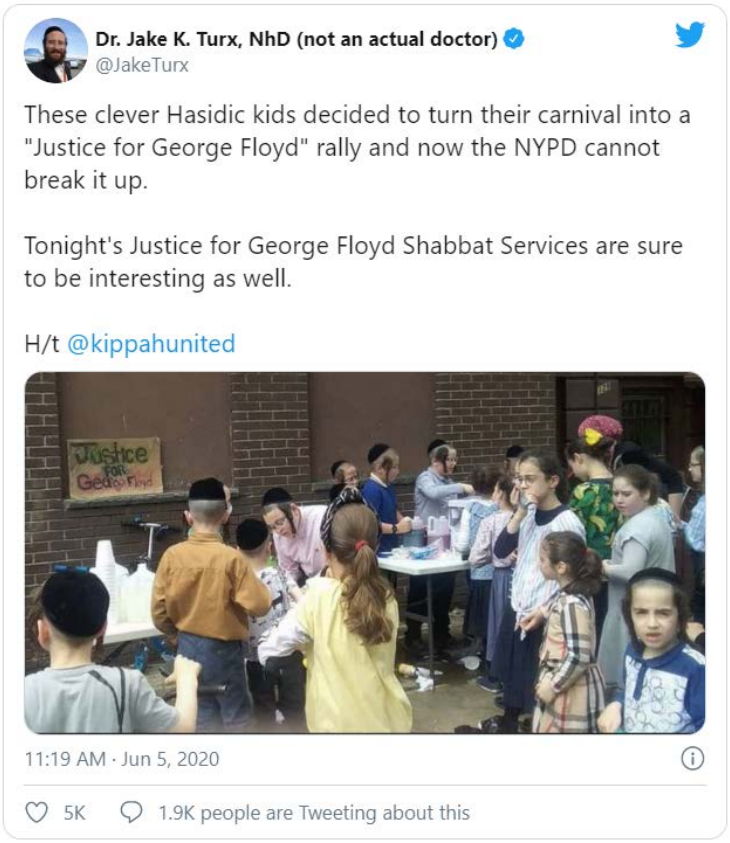
3. These same public officials even encouraged these protestors to "express" their "rage" so the public could "hear it."[1] Indeed, this "rage" was felt by many innocent bystanders and protestors who became victims of violence, looting, destruction of property, and even fatal attacks. And whereas the general public was required to wear masks whenever they went out in

[1] (Vivian Ho, *George Floyd Protests in California Stretch From Biggest Cities to Smaller Towns*, THE GUARDIAN (June 1, 2020, 5:28 P.M.), https://bit.ly/2XRfP0Q.)

public, protestors and rioters were often given a pass by officials.[2]

4. Of course, these protests could have been shut down—just like California shut down churches. Indeed, when peaceful protests against California's stay-at-home orders occurred at the state Capitol, Governor Newsom was quick to shut them down.[3]

5. This favoritism has caused a huge loss of confidence by the American people in their government leaders, public health officials, and the pandemic restrictions. The too frequently repeated joke—which is not just a joke—is that any otherwise unlawful gathering can proceed as long as it is termed a "political protest":



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[2] (Joseph Curl, *New Study Claims Black Lives Matter Protests Actually SLOWED The Spread of Coronavirus*, DAILYWIRE.COM (July 2, 2020), https://bit.ly/3gQR1gH ["[M]any people without masks marched elbow to elbow down city streets."].)

[3] (Dustin Gardiner, *California Bans Protests at State Capitol After Opposition to Gov. Gavin Newsom's Coronavirus Stay-At-Home Order*, SAN FRANCISCO CHRONICLE (April 22, 2020, 10:11 A.M.), https://bit.ly/3ivYz93.)

[4] (See Bethany Mandel, *Time for New York's Jews to take their fight against Bill de Blasio to court*, WASHINGTON EXAMINER (Jun. 19, 2020), https://washex.am/38BE0Vh.)

6. Public officials' direct encouraging of favored groups to ignore the pandemic restrictions has caused amazing harm. As explained by Los Angeles County's Public Health Director, the "George Floyd" protests caused a spike in coronavirus cases in June and July 2020.[5] But the current spike does not result solely from the protests. Rather, as explained by a COVID-19 planning expert, the second cause of the spike is "mitigation fatigue,"[6] and the widespread decision by individuals in the age 20–50 demographic group to stop obeying pandemic restrictions.

7. Members of the age 20–50 demographic have stopped heeding the calls of the governor and other government officials to decrease mobility and contacts. They have resumed socializing without social distancing and wear masks only when required. They have intuitively recognized that imprecise, arbitrary COVID-19 mitigation measures are inappropriate and disproportionate—and have especially recognized that "the principle that freedom for me, but not for thee, has no place under our Constitution." (*Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) [Ho, J., concurring].)

8. The figure below, obtained from the CDC website, uses CDC data to explain how the early COVID-19 mitigation measures led to an approximate 40–50% decrease in mobility of California's residents in the transit, workplace, retail, and recreation spheres. Over the ensuing weeks, mobility gradually increased to a level of about 60–80% of baseline (20–40% decrease from baseline). New restrictions were instituted by California and Los Angeles officials on July 1 and July 13. But the CDC data does not show any change in the mobility curves, nor was the cumulative death curve affected—showing, in the conclusion of experts, widespread noncompliance.

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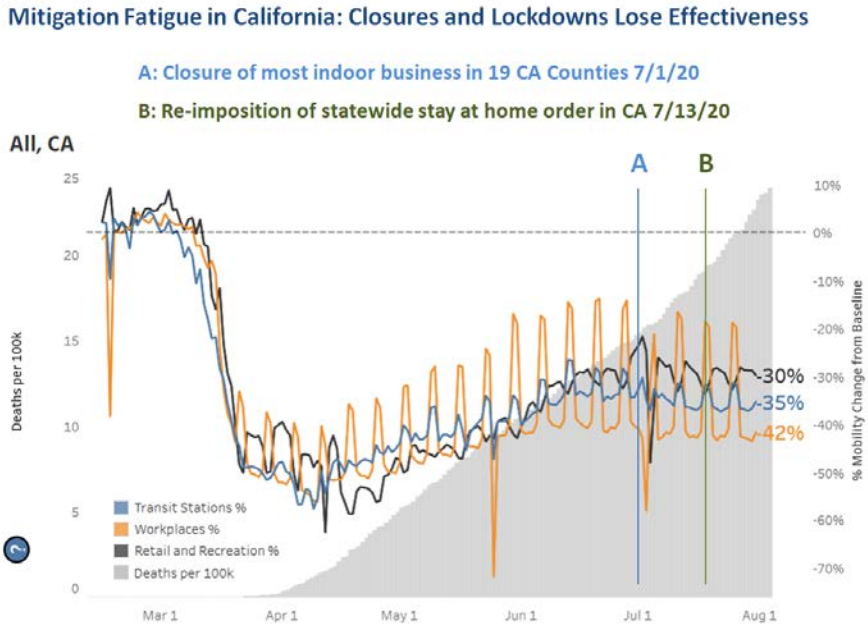
[5] (Nick Givas, *LA Mayor Garcetti admits 'connection' between coronavirus outbreak and protests, after downplaying link*, FOX NEWS (Jul. 2, 2020), https://fxn.ws/2Z4FCnc; Kevin Rector, *LAPD coronavirus cases spike, adding to debate over role of protests in spread*, LOS ANGELES TIMES (Jun. 23, 2020), https://lat.ms/2Cke9FB; *Protesters in Los Angeles encouraged to monitor for Covid-19 symptoms*, CNN (Jun. 9, 2020), https://cnn.it/3afB2X2.)

[6] (Supplemental Declaration of Dr. George Delgado, ¶ 12, *S. Bay United Pentecostal Church v. Newsom* (S.D. Cal. Aug. 10, 2020) No. 20-cv-865-BAS, ECF No. 53-4.)



9. In June and July, attempting to fight this spike, California targeted the wrong groups. California first lifted restrictions on gatherings that occurred outdoors—blessing after-the-fact the illegal conduct of the "George Floyd" protestors. California then banned singing in worship services and then shut them all down—unless they could modify their services to operate identically to the now-legal protests.

10. This blatant favoritism has not only led to spikes and a loss of confidence by the American people—but it has also resulted in forceful decisions by courts addressing these constitutional violations. One court recently enjoined New York Governor Cuomo and New York Mayor de Blasio from enforcing coronavirus regulations against places of worship differently from other places. (*Soos v. Cuomo* (N.D.N.Y. 2020) No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742.) Another wrote an opinion noting how had Louisiana not withdrawn its restrictions on worship, a similar injunction would have been forthcoming. (*Spell v. Edwards* (5th Cir. 2020) 962 F.3d 175, 180–83 [Ho, J., concurring].) And Justice Alito wrote a firm dissent, noting that, "the protests expressed a viewpoint on important issues, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment." (*Calvary Chapel Dayton Valley v. Sisolak* (2020) --- S. Ct. ---, 2020 WL 4251360, at *4 [Alito, J., dissenting].)

11. But amazingly, although California's and Los Angeles's refusal to enforce their

pandemic restrictions against favored protestors has led to a spike in coronavirus infection rates—with the causal connection undisputed by the parties—that refusal to enforce has not led to any spike in hospitalizations and deaths. Instead, the rates of *actual harm* flowing from the pandemic have continued to spiral downwards to negligibility. In other words, efforts to lower coronavirus infection rates have become completely divorced from efforts to lower actual hospitalization and death rates.

12. Having irreparably damaged the confidence of Americans—and Californians especially—who now realize that the pandemic restrictions are neither necessary nor good, on Sunday, July 26, 2020, Grace Community Church decided to resume worship services—joining millions of Americans in deciding that *enough is enough*. With deaths from the "COVID-19 suicide pandemic" exceeding those from the actual coronavirus pandemic, Grace Community Church decided that it would no longer sit by and watch its members and their children suffer from an absence of essential religious worship and instruction. Perhaps unsurprisingly—perhaps not—this led the County of Los Angeles to submit a demand letter to Grace Community Church, ordering it to comply with the restrictions that Los Angeles County deems unnecessary to enforce against so many others. Grace Community Church does not intend to comply.

13. It is time for California to recognize that disfavored religious minorities are not second-class citizens. It is time for California to explain how it can justify banning worship to prevent the spread of a disease (with an overall mortality rate of 0.02%) while it is fine for protestors to spread that disease like wildfire. As explained below, the death rates from the coronavirus are continuing to steadily decline. In a society hostile to religion, banning worship might be justified to prevent deaths. But how can California—the land of the Missions—justify unfairly imposing the burden of lowering coronavirus infection rates (not death rates) on worshippers?

14. The California State Constitution, mirroring the United States Constitution, specifically protects the individual right to free exercise of religion. The State would not be justified to place restrictions disparately and unequally in the manner it has even against a regular business or gathering; however, Grace Community Church and every other house of worship in

California enjoy heightened protection because our Founders recognized that the church has throughout world history been the target of secular kings and tyrants, not unlike Gavin Newsom. The Founders of the Nation and the State of California specifically protected freedom of speech, freedom of association and assembly, and free exercise of religion so that citizens could have their spiritual needs met through worshipping God together.

15. Further, the State of California must answer where it claims to derive such discriminatory authority from the specific, limited powers "We The People" (necessarily including Christians) have granted for our own protection to government. California has no such power to determine whether churches are "essential," as the federal and state constitutions have already done so. Grace Community Church provides a spiritual service to the Los Angeles community that its congregation and its members rightly believe is essential, and the California State Constitution specifically protects their fundamental rights in this context.

16. This Action presents facial and as-applied challenges to executive orders and guidance issued by the State of California (Governor Newsom, Attorney General Becerra, Acting Public Health Director Shewry, Acting Public Health Officer Pan, collectively, "California" or "the State"); orders issued by the County of Los Angeles (Public Health Director Ferrer, Public Health Officer Davis, Sheriff Villanueva, collectively "the County of Los Angeles"); and orders issued by the City of Los Angeles (Mayor Garcetti, Police Chief Moore, collectively "the City of Los Angeles").

JURISDICTION AND VENUE

17. This action arises under the California Constitution and applicable state law. Plaintiffs allege violations of Article I, sections 1, 2, 4, and 7 of the California Constitution. This Court has jurisdiction over the instant controversy under section 88 of the Code of Civil Procedure.

18. Venue is proper in this Court under sections 393(b), 394(a) and 401(1) of the Code of Civil Procedure.

THE PARTIES

19. Founded in 1956, Plaintiff Grace Community Church of the Valley, is a California non-profit corporation, located in Sun Valley, Los Angeles, California. The Church sues in its

own capacity and on behalf of its congregants. It is an open and accepting, multi-national, multi-cultural community that believes all people are children of God.

20. Plaintiff John MacArthur is a resident of the County of Los Angeles, California. He has served as the Pastor-Teacher of Grace Community Church for over fifty years, and is a member of the Church's Board of Elders. Pastor MacArthur sues in his official capacity as Pastor-Teacher of Grace Community Church and as representative of the Church's 42-member Board of Elders.

21. Defendant Gavin Newsom is sued in his official capacity as the Governor of California. The California Constitution vests the "supreme executive power of the State" in the Governor, who "shall see that the law is faithfully executed." (Cal. Const., art. V, § 1.) Governor Newsom signed the relevant executive orders.

22. Defendant Xavier Becerra is the Attorney General of California. As the State's chief law enforcement officer, Becerra is responsible for executing the State's police powers. He is sued in his official capacity.

23. Defendant Sandra Shewry is the Acting Director of the California Department of Public Health. Defendant Erica Pan is the Acting California Public Health Officer. Both succeed Sonia Angell, California's former Public Health Director and Officer. Under the authority of Governor Newsom's executive orders, Angell decided which employees in the State are to be "Essential Critical Infrastructure Workers," and otherwise promulgated California's public health orders. Shewry and Pan are sued in their official capacities.

24. Defendant Barbara Ferrer is Los Angeles County's Public Health Director. She, along with the Los Angeles County Board of Supervisors, declared a local health emergency on March 4, 2020. She is sued in her official capacity.

25. Defendant Muntu Davis is Los Angeles County's Public Health Officer. Relying on the local health emergency issued by Defendant Ferrer, he has issued Los Angeles County's pandemic related health orders. He is sued in his official capacity.

26. Defendant Alejandro Villanueva is the Sheriff of Los Angeles County. He is responsible for enforcing California's and Los Angeles County's pandemic orders. He is sued in his official capacity.

27. Defendant Eric Garcetti is the Mayor of the City of Los Angeles, California. Mayor Garcetti declared a local emergency for the City of Los Angeles, and promulgated the City of Los Angeles's pandemic-related executive orders. He is sued in his official capacity.

28. Defendant Michel Moore is the Chief of Police of the City of Los Angeles. He is responsible for enforcing California's and Los Angeles City's pandemic orders. He is sued in his official capacity.

29. Each and every Defendant acted under color of state law with respect to all acts or omissions herein alleged.

BACKGROUND

A. The History of Grace Community Church and Pastor John MacArthur

30. On July 1, 1956, Grace Community Church of the Valley conducted its first public services. Founded as a nondenominational church, its emphasis was on the basics of biblical Christianity. The fledgling church called Dr. Don Householder, one of the great preachers of his generation, to be its founding pastor. Worship services were conducted in the two main rooms of a converted townhouse, where a wall had been taken down to enable Dr. Householder to see his entire congregation while preaching.

31. In 1957, services were moved to the newly built chapel at the present location on Roscoe Boulevard. Less than two years later, two services were being conducted on Sunday mornings, the first education building was built to house Sunday school classes, and Grace Community Church became known as "the fastest growing church in Los Angeles."

32. Dr. Householder died in April 1965, and in 1966, Dr. Richard Elvee was called to be pastor. Dr. Elvee had become known as a church builder. Grace Community Church continued to grow under Dr. Elvee's leadership until he passed away in September 1968.

33. Dr. John MacArthur assumed the pastorate of the Church in February 1969, and has remained Grace Community Church's pastor ever since—over 50 years. Prior to this, Pastor MacArthur had been assistant pastor in the church his father led in Burbank. He had also traveled widely as a conference speaker and representative for Talbot Theological Seminary, from which he graduated with honors. Also in 1969, Pastor MacArthur founded Grace to You, a

nonprofit organization responsible for developing, producing, and distributing Pastor MacArthur's books, audio resources, and the "Grace to You" radio and television programs.

34. During the early days of Pastor MacArthur's ministry, Grace Community Church doubled in size every two years. The Church moved from meeting in the Chapel to the newly built Family Center (now the Gymnasium) in 1971, and from there into the current Worship Center in 1977. Since then, additional buildings for teaching and fellowship use have been erected. In the ensuing years, the Lord has blessed the Church with exceptional growth in terms of both people and ministries.

35. In 1985, Pastor MacArthur became president of The Master's University (formerly Los Angeles Baptist College), an accredited, four-year liberal arts Christian college in Santa Clarita, California. In 1986, Pastor MacArthur founded The Master's Seminary, a graduate school dedicated to training men for full-time pastoral roles and missionary work. These institutions exist to train students according to the teachings of the Bible.

36. Since completing his first best-selling book *The Gospel According to Jesus* in 1988, Pastor MacArthur has written nearly 400 books and study guides. Pastor MacArthur's titles have been translated into more than two dozen languages. *The MacArthur Study Bible*, the cornerstone resource of his ministry, is available in English, Spanish, Russian, German, French, Portuguese, Italian, Arabic, and Chinese.

37. Currently, "Grace to You" radio airs more than 1,000 times daily throughout the English-speaking world, reaching major population centers on every continent of the world. It also airs nearly 1,000 times daily in Spanish, reaching 23 countries from Europe to Latin America. "Grace to You" television airs weekly on DirecTV in the United States, and is available for free on the Internet worldwide. All of Pastor MacArthur's 3,000 sermons, spanning more than four decades of ministry, are available for free on the Grace to You website.

38. More important than numbers, programs, and structures, however, is the foundation for the spiritual life of Grace Community Church that has been built. This foundation includes sound doctrine, spiritual leadership, and active service. The Church is convinced that God's legacy of faithfulness to it will continue in the future if it remains faithful to Him and His Word.

39. Grace Community Church believes in "Biblical Eldership." An elder is one of a plurality of biblically qualified men who jointly shepherd and oversee a local body of believers. The word translated "elder" is used nearly twenty times in Acts and the epistles in reference to this unique group of leaders who have responsibility for overseeing the people of God. The consistent pattern throughout the New Testament is that each local body of believers is shepherded by a plurality of God-ordained elders.

40. The primary responsibility of an elder is to serve as a manager and caretaker of the church. (1 Tim. 3:5.) That involves a number of specific duties. As spiritual overseers of the flock, elders are to determine church policy (Acts 15:22), oversee the church (Acts 20:28), ordain others (1 Tim. 4:4), rule, teach, and preach (1 Tim. 5:17; cf. 1 Thess. 5:12; 1 Tim. 3:2), exhort and refute (Titus 1:9), and act as shepherds, setting an example for all (1 Pet. 5:1-3). Those responsibilities put elders at the core of the New Testament church's work. Presently, Grace Community Church is governed by a group of 42 elders, including Pastor MacArthur, who serves as head teaching pastor.

B. The Early History of the Executive Orders

41. On March 4, 2020, both the County and City of Los Angeles separately declared a local health emergency. (Ex. 2-1; 3-1; 3-2.) A few days later, on March 15, 2020, the City issued an order closing certain businesses, such as movie theaters, restaurants, and gyms. (Ex. 3-3.) The next day, March 16, 2020, the County issued an emergency order prohibiting gatherings of more than 50 people. (Ex. 2-2, 2-3, 2-4.)

42. Two days later, on March 19, 2020, California Governor Newsom issued his Executive Order N-33-20 in which he ordered that, "all residents are directed to immediately heed the current State public health directives." (Ex. 1-1.) The state public health directives require "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (Ex. 1-1.)

43. A few days later, on March 22, 2020, the California Public Health Officer and Director designated a list of "Essential Critical Infrastructure Workers." (Ex. 1-2.) This list was

supposed to include "essential" workers "needed to maintain continuity of operations of the federal critical infrastructure sectors." (Ex. 1-1.) However, also included on this list were industries California viewed as uniquely important, such as the Hollywood movie industry. (Ex. 1-2.) Included on the list of the "essential workforce" were "faith based services that are provided through streaming or other technology." Thus, at the very beginning, California began identifying the specific type of government-sanctioned worship.

44. California's order and list of essential workers were adopted and re-promulgated by the County of City of Los Angeles in a series of orders dated between March 19 and 21, 2020. (Ex. 2-5, 2-6; 3-4.) A few weeks later, on April 10, the County published a "Social Distancing Protocol" to which all essential businesses operating within the County and City were required to adhere. (Ex. 2-7.) This was Stage 1 of Governor Newsom's 4-Stage "Resilience Roadmap" pandemic plan.

45. After about six weeks of Stage 1, however, Californians began anticipating the day when they could reap the benefits of their hard work—their sacrifice. They began anticipating a lessening of the extreme measures imposed on them by their elected leaders, and began pushing for that lessening to come soon.

46. In response to that pressure, on Tuesday, April 27, 2020, Governor Newsom held a press conference in which he outlined how we "have not only bent the curve in the state of California, but stabilized it."[7] As a result, "[t]he reality is, we are just a few weeks away, not months away, from making measurable and meaningful changes to our stay-at-home order."[8] This was supported by Governor Newsom's later recitation of the statistics:

> The number of hospitalizations, 1.4% increase. Again, we're seeing some stabilization, decrease, modest increase, decrease, modest increase in the total number of people hospitalized. The number of people in ICU's basically flat from yesterday, just one individual

[7] (California Governor, *Governor Gavin Newsom Provides an Update on the State's Response to the COVID-19 Pandemic*, FACEBOOK (Apr. 27, 2020), https://bit.ly/3h19rLw, at 6:03.)
[8] (*Id.* at 6:40.)

more than in the last 24 hours in the ICU—so again, stabilization.[9]

Towards the end of the press conference, Governor Newsom announced that during a press conference on the next day, he would outline the forthcoming "measurable and meaningful changes to our stay-at-home order."

47. On Wednesday, Aril 28, 2020, Governor Newsom announced that those "meaningful modifications" would come in the form of moving to Stage 2 of the Resilience Roadmap.[10]

48. During the press conference, Dr. Sonia Angell—then California Public Health Officer and Director of the California Department of Public Health—explained Stage 2 as follows:

> In stage 2, we're going to really start focusing on lower risk workplaces, that means gradually opening some of those workplaces with adaptions. These include things like: Retail, allowing for curbside pickup; *Manufacturing, which can include things like toys, clothing, other things, furniture, that was not a part of the essential sector*; Talking about offices, this can include things like PR firms, and consulting, and other places where telework is not possible, but by modifying the environment itself, it can make it lower risk for individuals; and then ultimately talking about opening more public spaces, things like parks and trails, that may have historically been limited because of our concerns, trying to think about how we can modify that to make them safer for individuals to enjoy the outdoor spaces because we know physical activity is so important to our health, and this is also about health, clearly.[11]

49. Dr. Angell then described Stage 3 and 4 as follows: "The third stage is when we get into those areas that may be higher risk, those sectors that we think will take a lot more modification to adapt in a way that can make them places where people can move with lower risk."[12] "Those are things like getting your hair cut, uh getting your nails done, doing anything that has very close inherent relationships with other people, where the proximity is very close."[13] "And then

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[9] (*Id*. at 25:04.)
[10] (California Governor, *Governor Gavin Newsom Provides an Update on the State's Response to the COVID-19 Pandemic*, FACEBOOK (Apr. 28, 2020), https://bit.ly/2Wphz0v.)
[11] (*Id*. at 37:29 [italics added].)
[12] (*Id*. at 35:22.)
[13] (*Id*. at 35:52.)

ultimately, the space that we all look forward to, someday as we move forward and work diligently together, is Stage 4, which would be the end of the stay-at-home order. And that's when we'd be opening all of our highest risk workplaces without modification necessary at that time, because at that time we will know that we have identified a way that we can keep people safe from COVID-19."[14]

50. Then, on May 4, 2020, Governor Newsom issued a press release in which he stated that Stage 2 would begin, in part, on Friday, May 8, 2020. According to that press release, only some businesses would be allowed to reopen, like "bookstores, clothing stores, florists and sporting goods stores," but not yet "offices, seated dining at restaurants, shopping malls or schools."[15]

51. On May 7, 2020, Governor Newsom held a press conference to announce the beginning of Stage 2. During that press conference, Governor Newsom was asked by a journalist why schools were being prioritized over places of worship. The following exchange followed:

> Q: Thank you Governor. Can you clarify why churches and salons are in Stage 3 and not Stage 2. Um, what makes them more high risk than schools, for example? Uh, what factors are you weighing here when you decide what goes into what phase?
>
> A: Yeah, we're, we're looking at the science, epidemiology, looking again at frequency, duration, time, uh, and looking at low risk-high reward, low risk-low reward, looking at a series of conditions and criteria, as well as best practices uh from other states and nations.[16]

In other words, places of worship were being sidelined because they provide a "low reward" in the eyes of California.

52. On May 7, 2020, Governor Newsom also published his Resilience Roadmap online. (Ex. 1-3.) That Roadmap identified the industries that could open immediately (retail for curbside pickup, manufacturing, and logistics), those that would open in a few weeks (shopping malls, car

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[14] (*Id*. at 46:49.)
[15] (Office of Governor Gavin Newsom, *Governor Newsom Provides Update on California's Progress Toward Stage 2 Reopening* (May 4, 2020), https://bit.ly/2WnnOSx.)
[16] (California Governor, *Governor Gavin Newsom Provides an Update on the State's Response to the COVID-19 Pandemic*, FACEBOOK (May 7, 2020), https://bit.ly/2DNy9kj, at 50:36.)

washes, schools, restaurants), and those that could not open for several months, until Stage 3 was announced (salons, tattoo parlors, gyms, bars, movie theaters, and places of worship). (Ex. 1-3, at 9.) For each industry that would be allowed to open in Stage 2, the Roadmap also linked to industry-specific Pandemic Guidance with which the industry had to comply. The industry had to both comply with the guidance and certify to the state that it complied. At the same time, Governor Newsom published a press release announcing the "Resilience Roadmap" and explaining the same. (Ex. 1-4.)

53. Then the federal government weighed in.[17] On May 19, 2020, the U.S. Department of Justice sent a letter to Governor Newsom stating that his Resilience Roadmap violated the civil rights of religious Californians. In its letter, the DOJ stated:

> Religion and religious worship continue to be central to the lives of millions of Americans. This is true now more than ever. Religious communities have rallied to protect their communities from the spread of this disease by making services available online, in parking lots, or outdoors, by indoor services with a majority of pews empty, and in numerous other creative ways that otherwise comply with social distancing and sanitation guidelines. We believe, for the reasons outlined above, that the Constitution calls for California to do more to accommodate religious worship, including in Stage 2 of the Reopening Plan.

The DOJ's letter was sent by Eric S. Dreiband, Assistant Attorney General for the Civil Rights Division, and California's four U.S. Attorneys: McGregor W. Scott, Nicola T. Hanna, David L. Anderson, and Robert S. Brewer.

54. On May 20, buoyed in part by the DOJ's letter, houses of worship across California and the country began declaring that they would reopen for Pentecost Sunday—to celebrate the end of the Easter season—regardless of any executive orders. In California, 3,000 Christian churches announced in a letter to Governor Newsom that they would reopen.[18] In Minnesota, its

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[17] (Letter from Eric S. Dreiband, Ass. Attorney General, to the Hon. Gavin Newsom, Governor of California (May 19, 2020), https://politi.co/2ZztR8r.)

[18] (Sam Stanton, *Thousands of churches say they will defy California governor and hold services May 31*, The Sacramento Bee (May 20, 2020), https://bit.ly/32hDvhU.)

Catholic bishops announced in a letter to their Governor that they would also reopen.[19]

55. Further, on May 22, 2020, President Donald Trump held a press briefing. During that press briefing, President Trump stated:

> Today I am identifying houses of worship: churches, synagogues, and mosques, as essential places that provide essential services. . . . These are places that hold our society together and keep our people united, the people are demanding to go to church, synagogue, go to their mosque, many millions of Americans embrace worship as an essential part of life. The ministers, pastors, rabbis, imams, and other faith leaders will make sure that their congregations are safe, as they gather and pray. I know them well, they love their congregations, they love their people, they don't want anything bad to happen to them or anybody else. The governors need to do the right thing and allow these very important essential places of faith to open right now, for this weekend. If they don't do it, I will override the governors.[20]

56. On Monday, May 25, 2020, Governor Newsom announced changes to his Resilience Roadmap with respect to constitutionally protected protesting and worship activities. With respect to both, Governor Newsom permitted individual counties to apply for 21-day licenses during which worship and protest would be permitted so long as the gathering did not exceed 25% of "building capacity" or "the relevant area's maximum occupancy," and with a maximum cap of no more than 100 persons. However, California remained in "Stage 2." Alongside this change, Governor Newsom published industry guidance for "Places of Worship" (Ex. 1-5), and updated the Q&A page on coronavirus website concerning political protests. (Ex. 1-6.)

57. Before each 21-day license would be issued, the county would have to certify that it satisfied certain statistical benchmarks. The next day, May 26, 2020, Governor Newsom also announced that hair salons and barbershops could reopen (moving them from "Stage 3" to

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[19] (Letter from Eric Rassbach, The Becket Fund for Religious Liberty, to Tim Walz, Governor of Minnesota (May 20, 2020), https://bit.ly/30dv7gP; MPR News Staff, *Minnesota's Catholic bishops say they'll defy Walz's limits on church attendance*, MPR (May 20, 2020), https://bit.ly/3erpMHK.)

[20] (*Press Briefing by Press Secretary Keyleigh McEnany*, WHITE HOUSE (May 22, 2020), https://bit.ly/2WrcmoQ.)

"Stage 2").[21] On May 26, 2020, Los Angeles County and City amended their orders to permit houses of worship to reopen, and then on May 29, 2020, amended them to allow restaurants and hair salons to reopen. (Ex. 2-8; 2-9; 3-5; 3-6.)

58. On June 12, Governor Newsom quietly changed the industry guidance for "Places of Worship" and the Q&A page concerning political protesting. On that date, Governor Newsom lifted all restrictions on them when they occurred outdoors—but continued the 100-person cap or 25% occupancy limit for indoor worship or protesting. (Ex. 1-7; Ex. 1-8.)

59. On July 6, 2020, Governor Newsom changed the industry guidance for "Places of Worship" and the Q&A page concerning political protesting. On that date, Governor Newsom banned "indoor singing and chanting activities." (Ex. 1-9; Ex. 1-10.) This led law enforcement in some counties to announce they would not enforce that order.[22]

60. Then, on July 13, 2020, Governor Newsom banned 30 counties from conducting several indoor activities, including worship and protest. (Ex. 1-11; Ex. 1-12; Ex. 1-13.) This included small gatherings of worshippers in homes.[23] Los Angeles was one of those counties (Ex. 1-11), and it and the City modified their orders to make clear that the ban on indoor activities applied in the County. (Ex. 2-10; 2-11; 3-7; 3-8; 3-9.)[24] This led to a group of senators to call for President Trump to get involved again, and speak out against this newest worship ban.[25]

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[21] (Noah Higgins-Dunn, *California to allow hair salons and barbershops to reopen in majority of state's counties, Gov. Newsom says*, CNBC (May 26, 2020, 3:41 PM), https://cnb.cx/2XvgSUd.)

[22] (District Attorney San Luis Obispo County, *SLO County DA Declared a Sanctuary County for Singing in Houses of Worship During COVID*, YOUTUBE (Jul. 31, 2020), https://youtu.be/KWjn233gMNM.)

[23] (Alex Swoyer, *Church sues California Gov. Gavin Newsom over ban against at-home Bible studies*, THE WASHINGTON TIMES (Jul. 20, 2020), https://bit.ly/2F6QlWz.)

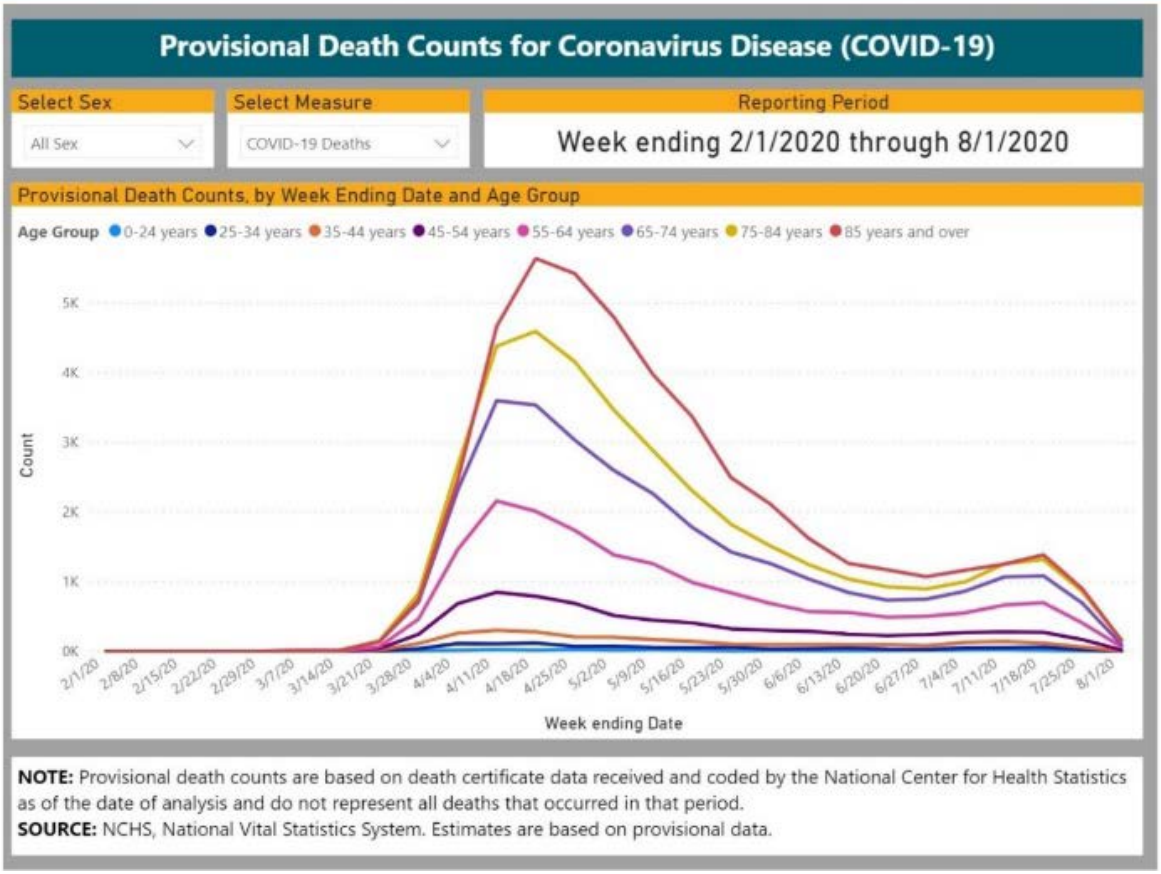
[24] Also closed were indoor and outdoor activities at bars and breweries, and indoor activities at restaurants, wineries and tasting rooms, movie theaters, family entertainment (e.g., bowling alleys, miniature golf, batting cages, arcades), zoos and museums, cardrooms, fitness centers, protests, non-essential offices, personal care services (e.g., nail salons, body waxing, tattoo parlors), hair salons and barbershops, and malls. (Ex. 1-13.) Not closed were indoor activities at other places, such as essential offices, manufacturing, and either essential or nonessential retail.

[25] (Letter from Senator Mike Lee, et al., to President Donald Trump (Jul, 23, 2020), https://bit.ly/33S3LA5.)

C. The Current State of the Pandemic—According to Official Numbers

61. Nationally, unified efforts by the American people to stop the coronavirus from spreading have been extremely successful. According to Centers for Disease Control and Prevention ("CDC"), between February 1 and August 11, 2020, there were 1,636,992 deaths in the United States, with 146,414 deaths occurring as a result of COVID-19—or 8.94%.[26] The pandemic peaked in April and has since dramatically declined, as is impressively shown by the CDC graph below.[27]

> Table 1. Deaths involving coronavirus disease 2019 (COVID-19), pneumonia, and influenza reported to NCHS by sex and age group. United States. Week ending 2/1/2020 to 8/1/2020



[26] (National Center for Health Statistics, *Daily Updates of Totals by Week and State: Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Aug. 11, 2020), https://bit.ly/2Fknkab.)

[27] (National Center for Health Statistics, *Weekly Updates by Select Demographic and Geographic Characteristics*, CENTERS FOR DISEASE CONTROL & PREVENTION (Aug. 11, 2020), https://bit.ly/3gSnALs.)

At its peak, 17,015 people died from the coronavirus in the week of April 11–18, 2020, but by the week of July 25 to August 1, 2020, there were only 2,016 deaths reported nationwide.

62. Turning to California, according to the U.S. Census Bureau, California has an estimated population of 39,512,223.[28] As of August 11, 2020, California has reported a total of 561,911 cases of COVID-19 and 10,468 fatalities from COVID-19.[29] The infection fatality rate—the likelihood of someone dying if they are infected with COVID-19—is only **1.8%** (10,468 ÷ 561,911). And the general infection rate is only **0.02%** (561,991 ÷ 39,512,223)—despite the fact that every day millions of people are indoors and in close proximity to each other in Costcos, Walmarts, Targets, Ralphs, Vons, Albertsons, Macys, and numerous other grocery markets and retail stores.

63. The two leading causes of death in California have the following rates out of 100,000, according to the CDC:[30]

Cause of Death	**Death Rate per 100,000**
Heart Disease	139.7
Cancer	135

In contrast, the number of deaths in California from COVID-19 per 100,000 total population is only **26.49**. Even if the death rate of COVID-19 tripled by the end of the year—a highly unlikely proposition—it is still significantly smaller than the leading causes of death in California—not even reaching half the death rate of heart disease or cancer. Further, in comparison to other states, as of August 10, 2020, California's death rate places it in the bottom half of all 50 states: it is ranked number 29—significantly lower than 28 other states.[31]

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[28] (*QuickFacts California*, U.S. CENSUS BUREAU (visited Aug. 11, 2020), https://bit.ly/2Cfenh5.)
[29] (COVID-19 Statewide Update, *Update for August 11, 2020*, COVID19.CA.GOV (Aug. 11, 2020), https://bit.ly/3gShjiQ.)
[30] (National Center for Health Statistics, *California*, CENTERS FOR DISEASE CONTROL & PREVENTION (visited Jul. 15, 2020), https://bit.ly/30hBP59.)
[31] (*Death Rates from Coronavirus (COVID-19) in the United States as Of August 10, 2020, by state (per 100,000 people)*, STATISTA (visited Aug. 11, 2020), https://bit.ly/2Zv8Mfi.)

64. Turning to Los Angeles County, as of August 11, 2020, Los Angeles County had a total of 4,996 deaths due to COVID-19.[32] The total cases of COVID-19 reported in Los Angeles County is 210,424.[33] The total population of Los Angeles County is 10,039,107.[34] With these numbers, the infection fatality rate—the likelihood of someone dying if he or she is infected with COVID-19—is only **2.3%** (4,995 ÷ 210,424). And the general infection rate is only **2%** (210,424 ÷ 10,039,107)—despite the fact that every day millions of Los Angeles County residents are inside of businesses, stores, markets, and restaurants, and in close proximity to each other.

65. As of August 10, 2020, in Los Angeles County the COVID-19 death rate per 100,000 people is 46—or **0.04%**. In comparison, the leading cause of death in Los Angeles County, according to the County's Office of Health Assessment and Epidemiology, is coronary heart disease—which has a death rate of 102.9 per 100,000.[35] In other words, a person in LA County is far more likely to die from a heart attack than from COVID-19.

66. The true COVID-19 fatality peak occurred long ago in late April (using the 7-day average) and has been on a steady decline. And even though California's and Los Angeles' encouragement of protestors led to a second spike in July, that spike is also now declining.[36]

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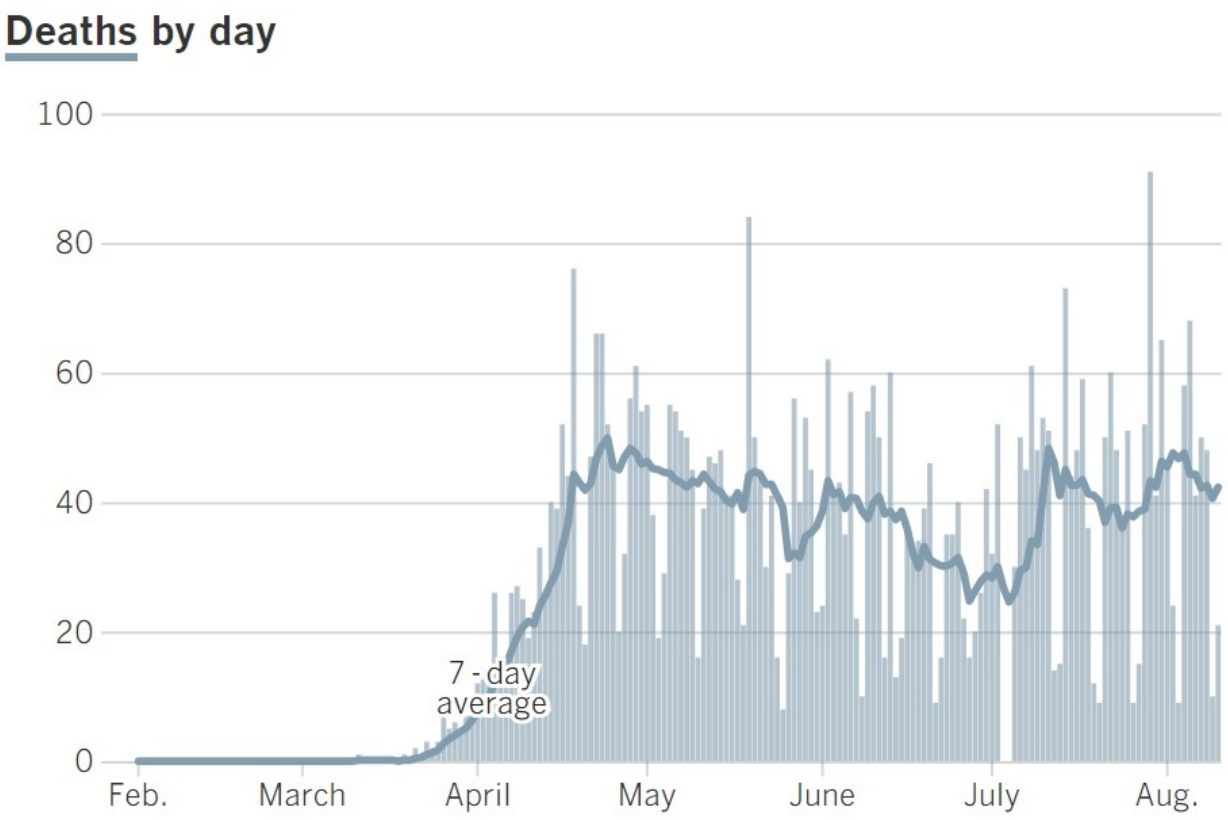
[32] (*LA County Daily COVID-19 Data*, COUNTY OF LOS ANGELES PUBLIC HEALTH (visited Aug. 11, 2020), https://bit.ly/3gRNiQd.)

[33] (See *id.*)

[34] (*QuickFacts Los Angeles County, California,* U.S. CENSUS BUREAU (visited Aug. 11, 2020), https://bit.ly/30Pj1vA.)

[35] (Barbara Ferrer et al., Office of Health Assessment & Epidemiology, *Patterns of Mortality in Los Angeles County: 2008-2017*, COUNTY OF LOS ANGELES PUBLIC HEALTH (2019), https://bit.ly/3aiCGr2.)

[36] (Los Angeles Times Staff, *Tracking the Coronavirus in Los Angeles County*, L.A. TIMES (Aug. 11, 2020, 11:57 P.M.), https://lat.ms/3gRbMJt.)



67. Finally, turning to Grace Community Church, there have been absolutely no recorded cases of COVID-19 at Grace Community Church since the inception of the coronavirus pandemic. Neither Pastor MacArthur nor any of his staff have tested positive for COVID-19, and since they have resumed worship services, they are unaware of any worshipper testing positive as a result of a worship service.

68. Further, whatever minimal justification the above dataset provides for restricting religious worship, it is only effective insofar as the underlying dataset presents an accurate picture of the reality of the COVID-19 pandemic. However, as numerous experts and reports have observed, it is readily apparent that variances in the attribution of causes of death and problems with rates of diagnosis have yielded a faulty dataset.

69. With respect to deaths, variances in attribution among the 50 states is widespread and documented. For example, on April 16, 2020, *The Washington Post* contrasted Alabama's practice, which "ruled that one of every 10 people who died with COVID-19 [in their system] did not die of COVID-19," with that of Colorado, where all deaths involving respiratory

complications were classified as COVID-19 deaths—even where no type of diagnostic test was administered in order to confirm the presence of coronavirus in a given test subject.[37]

70. Despite these apparent discrepancies, on April 8, 2020, Dr. Deborah Birx of CDC acknowledged that all deaths of patients who die with coronavirus in their systems would be classified as "COVID-19" deaths regardless of the actual cause of death.[38] The absurd result that this practice yields was underscored when, on July 16, 2020, the Florida Department of Health confirmed that it had counted and reported the death of a victim of a horrific motorcycle accident as a COVID-19 death due to the mere presence of coronavirus in his system.[39] Months earlier, on May 27, 2020, *National Geographic* warned of the possibility of just such a result, observing that, "[r]egardless of whether a death is due to a car crash or COVID-19, the process remains largely the same."[40]

71. Nevertheless, the CDC has not changed its practices. As one statistical expert has noted, "data related to testing and health must be considered" and "omitting variables biases conclusions."[41] Despite this ominous failure, which any undergraduate statistics student is exhorted to guard against, the dataset used by California decisionmakers to ban religious exercise patently fails to account for variables that may cause death other than COVID-19.

72. With respect to infections, the available dataset also exhibits a notable failure to account for problems with the rates of diagnosis of COVID-19. For example, in experiments utilizing samples taken from subjects who had submitted to the CDC's "gold-standard" Reverse Transcriptase Polymerase Chain Reaction (RT-PCR) test, board certified Pathologist Dr. Sin

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[37] (Emma Brown et al., *Which Deaths Count Toward The Covid-19 Death Toll? It Depends On The State,* WASHINGTON POST (Apr. 16, 2020, 3:30 A.M.), https://wapo.st/2PKgbld.)
[38] (Louis Casiano, *Birx Says Government is Classifying All Deaths of Patients With Coronavirus as 'COVID-19' Deaths, Regardless of Cause*, FOX NEWS (Apr. 7, 2020), https://fxn.ws/2E0z6pC.)
[39] (Danielle Lama, *Questions raised after fatal motorcycle crash lested as COVID-19 death,* FOX 35 INVESTIGATES (Jul. 16, 2020), https://bit.ly/31MoAu1.)
[40] (Carrie Arnold, *What we'll need to find the true COVID-19 death toll*, NATIONAL GEOGRAPHIC (May 27, 2020), https://on.natgeo.com/33U97uE.)
[41] (Declaration of Charles Cicchetti, Ph.D., ¶ 7, *S. Bay United Pentecostal Church v. Newsom* (S.D. Cal. Aug. 10, 2020) ECF No. 53-5 in Case No. 20-cv-865-BAS.)

Hang Lee demonstrated that the RT-PCR test yielded a distressingly high incidence of mis-diagnosis. Indeed, Dr. Lee's experiments revealed that actual COVID-19 infection did not match the CDC samples' labels, and as such some of the samples labeled "CDC-test-positive" were actually negative, and vice versa.[42]

73. In this context, after five months of trying to get its act together, California cannot rely on its own scientific blunders to justify burdening constitutionally-protected religious worship. At the beginning of the pandemic, California and other states could arguably rely on the "fog of war" to justify restricting rights, and requesting that the American people bunker down. But as time passes, the excuse that California does not understand the nature of the threat wears thin—as evidenced by the fact that Californians are no longer complying with the pandemic restrictions.

D. California's Monitoring List Causes More Harm than Good

74. To determine whether worship will be banned in any individual county, California continues to rely "heavily, if not exclusively, on COVID-19 case counts (cases) to determine the state or phase of recovery"[43] Using infection rates, and not hospitalization or death rates, makes no sense. Perhaps (and this is a very big perhaps), death rates could justify some limited and narrowly tailored restrictions on constitutional rights—but it is hard to understand how infection rates *qua* infection rates ever could. Infection rates do not translate to death rates. For example, there are differing mortality rates in different segments of the population. "The mortality risk for those infected . . . is not the same for all patients . . . The CDC's current best estimates are that the symptomatic fatality rate from COVID-19 among patients less than 50 years old is 0.05%, or 5 in 10,000; 0.2% for patients between age 50 and 64; and 1.3% for patients 65 and above."[44]

75. At least one economist has noted, "[t]he use of the number of cases to drive this

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[42] (Sin Hang Lee, *Testing for SARS-CoV-2 in cellular components by routine nest RT-PCR followed by DNA sequencing*, INTERNATIONAL JOURNAL OF GERIATRICS AND REHABILITATION, 2(1):69–96 (Jul. 17, 2020), https://bit.ly/3gTvZOB.)

[43] (Declaration of Charles Cicchetti, ¶ 8.)

[44] (Declaration of Dr. Jayanta Bhattacharya, ¶37, *Brach v. Newsom* (C.D. Cal. Aug. 3, 2020) ECF No. 28-3 in Case No. 20-cv-6472-SVW.)

policy obfuscates matters and yields a flawed statistic and [is] a costly policy choice all things considered."[45] In fact, at least one Certified Public Health Professional (CPH) has observed that "commonly utilized susceptible, infectious, and recovered – or "SIR" – disease transmission modeling associated with COVID-19, together with WHO and CDC public health metrics, suggest that California's mandate is likely to make the overall public health situation worse and not better."[46]

76. Distressingly, experts have observed that concerns about the potential that California's policies could make the overall public health situation worse is no mere potentiality. At this point in the pandemic, both suicides and drug overdose deaths caused by the response to the pandemic are outnumbering deaths due to the coronavirus itself. The social side effects of mitigation measures are rearing their ugly dead.[47] "We now know that deaths due to non-specific effects of society's response to COVID-19 outnumber the deaths that might be due to COVID-19: deaths from suicides due to job loss and social isolation and deaths from lack of access to healthcare."[48]

77. California's case-number-dependent regression analysis is not the only model available for the consultation of decisionmakers when they implement policies for the laudable purpose of protecting vulnerable populations. Another expert has noted that California has, thus far, rendered policies based on "worst case predictions," which he notes is "unrealistic" since "society is well aware of the risks and recognizes the need to protect the vulnerable."[49] Instead, given the lower observed mortality rates over time described above, he advocates a strategy that

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[45] (*Id.* at ¶ 20.)
[46] (Declaration of Sean G. Kaufmann, ¶ 15, *S. Bay United Pentecostal Church v. Newsom* (S.D. Cal. Aug. 10, 2020) ECF No. 53-6 in Case No. 20-cv-865-BAS.)
[47] (*Transcript of COVID Webinar Series interview of Robert Redfield, MD*, BUCK INSTITUTE (Jul. 14, 2020), https://bit.ly/2FjcjWB.)
[48] (Declaration of James Lyons-Weiler, ¶ 18, *S. Bay United Pentecostal Church v. Newsom* (S.D. Cal. Aug. 10, 2020) ECF No. 53-7 in Case No. 20-cv-865-BAS; see also Leo Sher, *The impact of the COVID-19 pandemic on suicide rates*, GQM: AN INTERNATIONAL JOURNAL OF MEDICINE (JUN. 30, 2020), https://bit.ly/3iAE2QV.)
[49] (George Delgado, *California: Roadmap for a Balanced Recovery,* COVID PLANNING TOOLS (Jul 24, 2020), https://bit.ly/3kFXXQ3.)

"tolerate[s] the spread of the virus as long as the hospital system is not overwhelmed." Such controlled spread would be monitored through a Monte Carlo analysis of R(t) (a variable indicating the "reproduction number of the virus over time,"), daily deaths, the percentage of positive tests, and daily hospitalizations in order to better track the true spread and mortality rate of the virus. Such an analysis consults multiple variables for the purpose of more accurately tracking the virus' impact to "prudently use the best indicators to protect [vulnerable populations]." [50]

78. Despite the availability of more accurate, alternative policies, California continues to insist on enforcing a failed model based on faulty data and a suspect case-number-based analysis. California persists in this approach despite the fact that various municipal authorities have observed and acknowledged with frustration that the analysis yields an "arbitrary and constantly changing framework" that lands counties on a "watch list" due to a mere increase in cases even as the absolute number of deaths remains low.[51]

79. Nevertheless, when the consequences of the measures taken thus far are honestly assessed, it becomes apparent that the measures themselves, as well as the datasets upon which such measures are ostensibly based, are analogous to the sort of "faulty counsel" that Francis Bacon, the very progenitor of the scientific method itself, exhorted must be avoided. As he warned:

> **We may have counsel given, hurtful and unsafe** (though with good meaning) and mixed partly of mischief and partly of remedy; even as if you would call a physician that is thought good for the cure of the disease you complain of, but is unacquainted with your body; and therefore may put you in way for a present cure, but overthroweth your health in some other kind; **and so cure the disease and kill the patient**.[52]

80. Unfortunately, Bacon's warning, as well as that of the scientists and statisticians

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[50] (George Delgado, *Rational Policy Strategies for the COVID-19 Pandemic*, COVID PLANNING TOOLS (July 12,2020), https://bit.ly/2XX164i.)

[51] (Eric Ting, *San Mateo County Health Officer Assails 'Fundamentally Flawed' State Watch List*, SF Gate (Aug. 6, 2020), https://bit.ly/3al9BeM.)

[52] (FRANCIS BACON, OF TRUE GREATNESS OF KINGDOMS AND ESTATES (1612) [boldings added].)

discussed above, was not heeded, and now the patient is dying not of COVID-19, but of all manner of spiritual, social, and economic maladies – maladies exacerbated by this State's apparent disdain (or, at best, neglect) for its citizens' spiritual welfare.

E. The "George Floyd" Protests

81. On Monday, May 25, 2020—the same day that California announced that worship and protesting could resume under the *same* strict regulations—a police officer in Minneapolis, Minnesota killed an African-American man in his custody named George Floyd. The next day, a video-recording of the interaction went viral on social media, leading to protests in Minneapolis. The day after that, Wednesday, May 27, protests erupted in cities across the country, including a protest with hundreds of participants in Los Angeles. (Ex. 4-1.) Protesters in Los Angeles blocked the 101 Freeway and became violent. However, from the very first protest, Los Angeles officials turned a blind eye: no arrests were made for any reason—neither for violence or the blatant violations of Governor Newsom's ban on any political protests exceeding 100 persons. (Ex. 4-2.)

82. Two days later, on May 29, 2020, protests became violent in downtown Los Angeles and the Los Angeles Police Department began to enforce the law, arresting over 500 protestors. The charges included "Burglary, Looting, Probation Violation, Battery on Police Officer, Attempt[ed] Murder and Failure to Disperse," but *no citations* for violations of COVID-19 restrictions were issued. (Ex. 4-3.)

83. Despite Newsom's strict COVID-19 restrictions on religious services that were being imposed on churches, Governor Newsom publicly supported the Black Lives Matter protests. On May 30, Governor Newsom issued a press release "thank[ing] . . . community members who exercised their right to protest." (Ex. 4-4.) The next day, Governor Newsom held a press briefing in which he again thanked and encouraged the protestors and the protest organizers, even going as far as to invoke God's blessing on them: "To those who want to express themselves . . . God bless you. Keep doing it. Your rage is real." (Ex. 4-5; 4-6.)

84. He further stated at the press conference: "I just again want to express my deep gratitude and my deep humility, to those leaders of every stripe, that all across this state and all across our nation, are doing justice in this moment, those demonstrators who are reaching out."

(Ex. 4-6.) "So I just want to thank all the leaders, not only again assembled here, but throughout the state, once again, for your courage, because now is a time for courage, now is a time for your voice to be brought to the forefront." (Ex. 4-6.) In discussing the reason behind the protests, Governor Newsom "expressed sympathy and showed support for the protesters," noting that "people have lost patience" and need to protest. (Ex. 4-7.)

85. Additionally, Governor Newsom tweeted his support for the protests, recognizing that "millions of people are lifting up their voices in anger" and that "protesters have the right to protest peacefully—not be harassed." (Ex. 4-8.) Newsom even re-tweeted a news article announcing an assembly of hundreds of people entitled, "Hundreds gather to paint Black Lives Matter street art." (Ex. 4-8.)

86. Therefore, with the governor's support, the protests in Los Angeles continued and attendance significantly grew from May 30 to June 3, 2020. Due to the violence of the protests, Los Angeles began enforcing curfews. But when it came to arrests, many were reportedly due to violations of the curfew—*not* the coronavirus shut-down orders. (Ex. 4-9.)[53]

87. On June 1, 2020, nearly 15,000 people gathered to protest in Oakland, California, and the Governor neither threatened nor imposed criminal sanctions on such gatherings despite the flagrant violations of his orders. (Ex. 4-15.)

88. On June 6, 2020, thousands of other protesters assembled in Sacramento, right outside the Governor's office, in blatant violation of the Governor's orders, and no criminal citations or threats were issued against them. (Ex. 4-16.)

89. By the following weekend of June 7, a protest in Hollywood had an estimated 100,000 people in attendance. (Ex. 4-10.)

90. On July 1, 2020, after the Governor had instructed people not to gather on July 4th, thousands of people again protested in Los Angeles and were not threatened with criminal

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[53] (See Associated Press, *Los Angeles Sees Protests Downtown, in Hollywood*, YOUTUBE.COM (June 2, 2020), https://youtu.be/_HA5OQvoQc8; KTLA 5, *Crowds Continue to March Through Downtown Los Angeles in Protest of George Floyd Killing*, YOUTUBE.COM (June 4, 2020), https://youtu.be/vkBuAjJ5lnM.)

sanctions for violation of the Governor's orders. (Ex. 4-14.)

91. On July 12, 2020, just one day prior to the July 13 Public Health Order prohibiting Plaintiffs from holding any religious worship services in over 30 counties (including in small groups in their own homes), thousands of additional protesters gathered in Martinez, California without mention or threat of criminal sanction for blatantly violating the Governor's orders. (Ex. 4-13.)

92. The governor is not the only one to have shown bias against churches and favor towards protests by discriminatorily enforcing COVID-19 orders. Los Angeles officials have also encouraged and participated in protests that defy the COVID-19 restrictions.

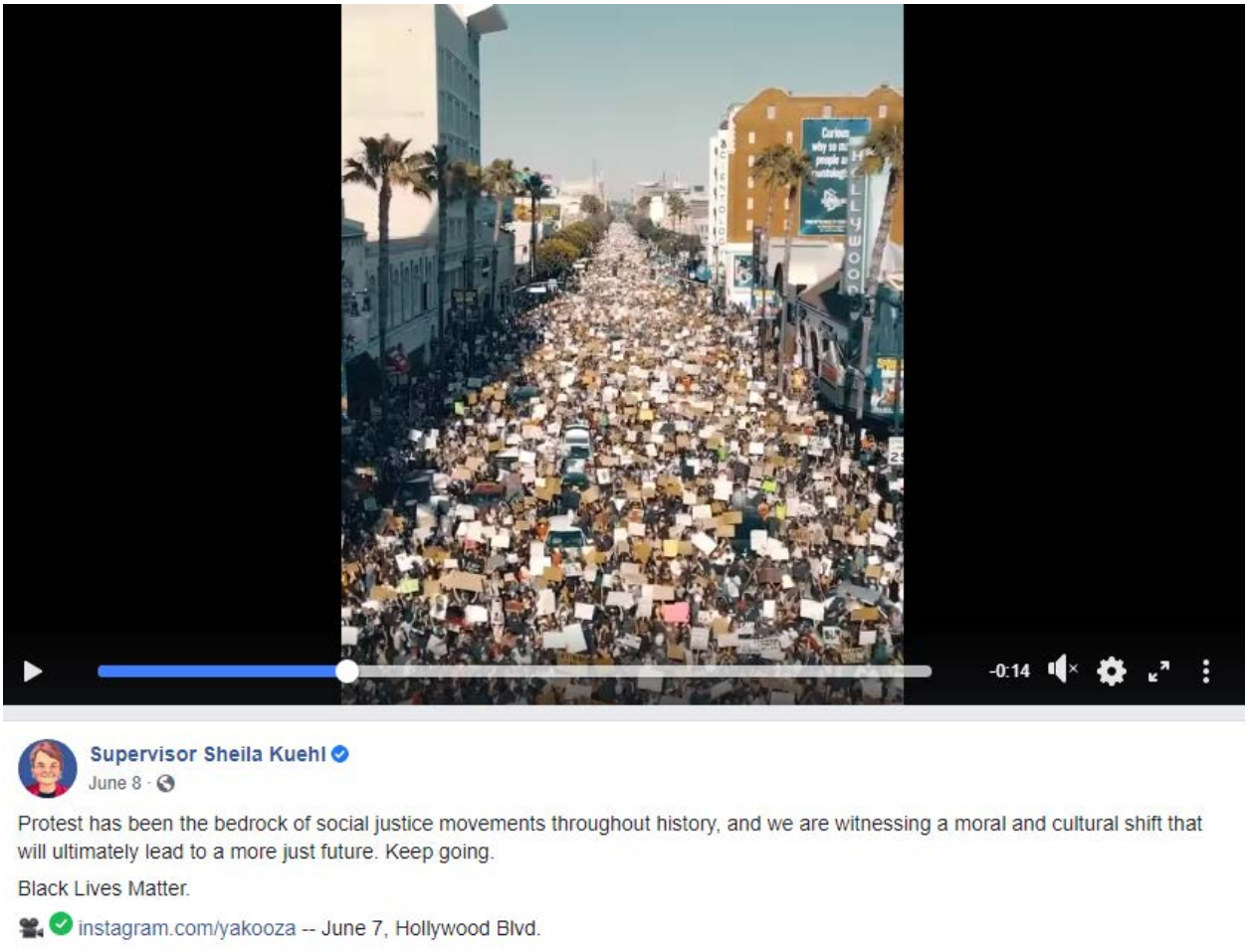
93. In fact, on June 2, 2020, Los Angeles Mayor Garcetti joined a protest, taking a knee amongst a dense crowd. (Ex. 4-11.) Video footage was taken of Mayor Garcetti in the middle of a protest, swarmed by people who were noticeably not attempting to follow the protocols for social distancing.[54] Mayor Garcetti stood in the video amongst a group chanting BLM slogans, harmonizing with their chants by words of reassurance of limiting funds for the police department. One media report noted that Garcetti was marching with church leaders. As can be seen, pastors are only targets when they are holding church services, and not when they are participating in politically charged protests favored by government officials.

[54] (See Daily Nation, *Los Angeles, Mayor Drops to his Knee in a Symbolic Act of Solidarity in Honour Of Floyd*, YOUTUBE.COM (June 2, 2020), https://youtu.be/6vZSe-3dIH4.)

94. Los Angeles Supervisor Hilda Solis also supported the protests, with no concern as to safety protocols for the pandemic. In fact, in a statement, she encouraged people to take part in the protests in order to unify people because of the difficulties of the pandemic. She states: "This pandemic and economic crisis have upended our lives. I am certain we will get through this difficult moment together, which is why I urge all of you to give voice to George Floyd's life, and the lives of all other black and brown people who were taken from us too soon due to police brutality." She continued to encourage people to protest: "My hope is that the right to protest is practiced, and protected, nonviolently and that everyone remains safe." In addition, Supervisor Solis makes it clear that it is by physically taking to the streets to protest with others, and not any kind of remote live streamed service such as the churches had been reduced to, that George Floyd is to be remembered: "**We uplift George Floyd's life by protesting his death peacefully.**" (Ex. 4-12.)

95. Similarly, on June 8, 2020, Supervisor Solis tweeted that she is "in solidarity with all peaceful protesters who gathered over the weekend at Mariachi Plaza" and referenced "hundreds" of protesters, sharing a video showing protesters:

96. Los Angeles Supervisor Sheila Kuehl has encouraged the illegal and unsafe practices of protestors. Supervisor Kuehl posted on Facebook a video of the June 7, 2020 protests in Hollywood, which shows many thousands of protesters packed together for miles on the street. Kuehl did not anywhere condemn the protestors for egregious violations of government orders, but rather encouraged and expressed her pride in the protests. "Protest has been the bedrock of social justice movements throughout history, and we are witnessing a moral and cultural shift that will ultimately lead to a more just future. Keep going."[55]



97. A media report of the protest estimated that as many as 100,000 people were in attendance at the protest. (See Ex. 4-10.) But in her official capacity as supervisor, Kuehl gave no warning to the protesters or ever expressed hope that they stay healthy or follow the law. Although older people at risk were told to stay home from church, and families were shut out of

[55] (Supervisor Sheila Kuehl, *Untitled Video*, FACEBOOK.COM (June 8, 2020), https://www.facebook.com/sjkuehl/videos/342233100077423.)

the churches per the government's guidelines, the supervisor encouraged people to participate in a protest where "parents brought their children and grandchildren brought their grandparents." (Ex. 4-10; see also Ex. 4-11.)

98. In addition, Kuehl authored a motion to require COVID-19 protective gear for law enforcement, and restrict arrests of illegal protestors. In essence, the motion seeks to help the protestors "safely" violate the ban on gatherings.

99. When asked at a July 2, 2020 press conference about how there is selective enforcement between protests and other gatherings, Governor Newsom responded: "[P]eople . . . understand that we have a Constitution, we have a right to free speech and we are all dealing with a moment in our nation's history that is profound and pronounced . . . but I recognize the dichotomy and to the extent the dialectic between those examples and all I can offer is this consideration: Do what you think is best not only for you but for the health of the people you love." (Ex. 4-17 [original ellipses].)

100. When asked about the dichotomous and disparate treatment of family, religious, or social gatherings and the often-violent protests in California, Governor Newsom stated that, "I recognize the dichotomy and to the extent the dialectic between those examples and all I can offer is this consideration: Do what you think is best not only for you but for the health of the people you love."people also understand that we have a Constitution, we have a right to free speech and we are all dealing with a moment in our nation's history that is profound and pronounced," and expressed praise for the protesters flouting his orders. (Ex. 4-17.)

101. Immediately, health experts began to worry about the consequences of the unregulated protests. At a national level, experts have been worried about a rise in new infections from the protests. (See Ex. 4-18.)

102. Despite the encouragement from Los Angeles officials to join the massive protests, Los Angeles County Director of Public Health, Dr. Barbara Ferrer, has publicly stated that the Black Lives Matter protests caused a spike in COVID-19 cases. Dr. Ferrer stated that it is "highly likely" that the protests contributed to a rise in positive COVID-19 cases. (Exs. 4-17 & 4-19.) Indeed, Dr. Ferrer confirmed that "[i]n situations where people are close together for longer

periods of time and it's very crowded, we are certain that there is going to be spread. So, we've never said that there's no spread from people who were protesting," Dr. Ferrer stated. (Ex. 4-20.)

103. Mayor Garcetti had stated at a June 29, 2020, press conference that COVID-19 spikes were ***not*** connected with the protests. However, two days later, he corrected his statement after meeting with Dr. Ferrer: "I talked again with Dr. Ferrer about that this morning. She does think some of the spread did come from our protests." (Ex. 4-20.)

104. Los Angeles Supervisor Kathryn Barger also confirmed that the protests helped facilitate the spread COVID-19. In an interview, she stated the following: "A lot of the protesters were not wearing a mask, and they definitely were not social distancing. And I believe that that's what we're seeing play out right now is as a result of that." And further she admitted: "I definitely think there's a direct correlation between the protesters and the spike." (Ex. 4-21.)

105. In full understanding of the public and private danger posed by the coronavirus, most churches and people of faith have conducted themselves, and intend to continue conducting themselves, in a manner that adheres to neutral CDC and California guidelines on social distancing and safe gatherings. But they cannot abide by restrictions imposed solely on them, either by explicitly discriminatory orders, unequal enforcement of neutral orders, or gerrymandered orders intended to protect favored groups.

106. Thus, if allegedly concerned about the plight of African-Americans in our nation, or about the death of George Floyd, or about police brutality generally, between May 25 and June 12, Californians were de facto allowed and encouraged to join a 1,000-person outdoor protests, but were not allowed to join with 101 people to pray indoors or outdoors. This discriminatory enforcement led millions of Americans to no longer respect the rule of law, and begin flouting it.

F. Grace Community Church's Response to the Coronavirus Pandemic

107. On March 12, 2020, Pastor MacArthur and the elders of Grace Community Church decided to close all in-person services to temporarily protect the congregation from the coronavirus and began to conduct livestream services. This was before either the City, the County, or the State issued their stay-home orders banning gatherings. Grace Community

Church closed its campus officially between March 15th and July 19th. Morning and evening worship services went to livestream only. Grace Community Church's regular weekly bible studies also began meeting on Zoom and not in person.

108. When the City, County, and State orders came in the next few days, Grace Community Church voluntarily abided by them. As Pastor MacArthur explained in a sermon, now nearly twenty-five years old, he and Grace Community Church believe that Christians have a duty to obey governmental authorities: "Christians have never been permitted to storm the castle, to revolt against the king, to kill the officials, to overtake the city hall, to defy the police, to disobey the law. That is all contrary to what the Bible teaches. No matter what the form of government, no matter what the style in which it works, we are called to respond to governmental authority."[56] Indeed, "subjection to the governing authorities includes much more than simply obeying civil laws. It also includes genuine honor and respect for government officials as God's agents for maintaining order and justice in human society."[57]

109. According to Pastor MacArthur and Grace Community Church:

> We believe the Scripture teaches that we are to submit to government even if that government does not function entirely (or even primarily) by biblical principles (Romans 13:1-7). That principle is explicit in Peter's message to servants (1 Peter 2:18-19), which directly follows his more general comments regarding government (1 Peter 2:13-17). And that epistle teaches the same thing over and over again in varied ways: Submit even if you suffer, because in doing so you identify with Christ and are blessed (cf. 1 Peter 2:21-24; 3:1-2; 4:12-14; 5:9-10). There are times when we must obey God rather than men, but **we believe that we should disobey the authorities only if they command us to do something directly against God's law** (e.g. Acts 5:29 and its surrounding context).
>
> That is a fine distinction, but it is precisely where the issue lies. If we say that Christians are only required to obey their government when it is functioning by scriptural principles, we then nullify the teaching of Romans 13:1-7 and 1 Peter 2:13-17 in just about any age

[56] (Pastor John MacArthur, *Obeying Civil Authorities*, GRACE TO YOU (Jul. 21, 1996), https://bit.ly/2CpKR8w.)

[57] (Pastor John MacArthur, *Christians and Submitting to Government*, GRACE TO YOU (Jul. 23, 2019), https://bit.ly/3gSmzTC [quoting Romans 13:1a].)

> of history-especially the time during which those passages were written! The Roman government was as corrupt and godless as any in history, and yet Paul and Peter told Christians to "live in subjection," "submit to every ordinance," and "honor the king.|
>
> So we believe that civil disobedience is justified only when government compels us to sin, or when there is no legal recourse for fighting injustice. The reason we draw the line there is simply because all the scriptural examples of civil disobedience fall squarely into those two situations. Any other kind of activism has no precedent in the Word of God and violates the spirit of Romans 13 and 1 Peter 2.[58]

110. Thus, during the pandemic, Grace Community Church voluntarily turned its focus away from in-person worship, to doing what it could to help the community. The majority of Grace Community Church's staff worked from home—from March 19th through the end of May. And for those who were unable to work at all, Grace Community Church covered their hourly wages for two months.

111. Grace Community Church began helping the community as much as it could. The Church began purchasing and delivering groceries to nearly one hundred needy families per week. Grace Community Church received significant food donations from a worldwide Christian non-profit, Children's Hunger Fund, and an individual restaurateur/farmer in Orange County. The Church delivered groceries for 19 weeks, and estimates that it spent 3,629 man-hours (191 hours per week) delivering the groceries.

112. Grace Community Church also continued its prison ministry. The Church provided thousands of meals to Los Angeles area jails—including both men's and women's jails, such as the Pitches Detention Center, the Century Regional Detention Facility, and the Men's Central Jail.

113. Grace Community Church also did its part to help during the riots. The Church allowed the Los Angeles Police Department to use its parking lot as a processing center for two

[58] (Pastor John MacArthur, *Can Christians Participate in Civil Disobedience?*, GRACE TO YOU (undated), https://bit.ly/340q0no [bolding added].)

nights during the riots, for which it received an award. In July, Grace Community Church lent its North Lot to the City of Los Angeles for a food drive event, for which it again received an award from the President of the Los Angeles City Council, Nury Martinez.

114. Closing for even a short period of time was very difficult on the congregation and on the Church. Its primary function and ministry of providing worship services, training for children, and being a literal sanctuary or refuge for the community had been severely burdened and restricted. After being closed for in-person services for 19 weeks, Pastor MacArthur and the elders of Grace Community Church decided to reopen the church for in-person gatherings. At a Board of Elders meeting held on July 23, 2020, all elders present voted **unanimously** to reopen the Grace Community Church campus. The Church also decided to hold worship services in their regular auditorium, in part because they have no adequate place to hold services outside. The elders then published a statement explaining their decision:

> God has established three institutions within human society: the family, the state, and the church. Each institution has a sphere of authority with jurisdictional limits that must be respected. . . . *God has not granted civic rulers authority over the doctrine, practice, or polity of the church.* The biblical framework limits the authority of each institution to its specific jurisdiction. The church does not have the right to meddle in . . . civil matters while circumventing government officials. And similarly, government officials have no right to interfere in ecclesiastical matters in a way that undermines or disregards the God-given authority of pastors and elders. . . .
>
> Therefore, in response to the recent state order requiring churches in California to limit or suspend all meetings indefinitely, we, the pastors and elders of Grace Community Church, respectfully inform our civic leaders that they have exceeded their legitimate jurisdiction, and faithfulness to Christ prohibits us from observing the restrictions they want to impose on our corporate worship services. . . .
>
> [W]e are not making a constitutional argument. . . . The right we are appealing to was not *created* by the Constitution. It is one of those unalienable rights granted solely by God, who ordained human government and establishes both the extent and the limitations of the state's authority (Romans 13:1–7). . . . In other words, freedom of worship is a command of God, not a privilege

granted by the state.[59]

115. The next Sunday, July 26, 2020, Pastor MacArthur explained their decision more fully in his sermon:

> [A]lcohol kills three million people a year; and all the liquor stores were open. . . . So far this year the death of quarter of a million people can be traced back to smoking. Cigarettes are for sale. Alcohol's for sale everywhere; you can have all you want. You can have a run on alcohol to the point that it eats up the aluminum cans. Smoking kills a quarter of a million people, cigarettes are available. By the way, the state had an interesting statistic: four hundred and forty-one thousand kids under 18 will die prematurely from smoking. Almost half a million kids currently under 18 will someday die from smoking. Where's the ban on cigarettes? . . .
>
> Kill people with alcohol. Kill people with cigarettes. Kill people with diseases because the hospitals don't function. Lock people up so that everybody's under stress, and make sure churches can't meet where it's the only place they could find hope and help. We will not bow to such bizarre standards. We'll follow our Lord and trust Him.[60]

116. On July 29, 2020, a law firm identifying itself as counsel for the County of Los Angeles sent Grace Community Church a letter demanding that it cease worshipping.

> Grace Community Church conducted indoor in-person services on July 26, 2020, violating the State and County health orders. Violating these orders is a crime punishable by a fine of up to $1,000 and imprisonment of up to 90 days. Cal. Health & Safety Code § 120295. Each day that you conduct indoor services is a separate offense. Pursuant to the State and County health orders, Grace Community Church must immediately cease holding indoor worship services.
>
> The County again request Grace Community Church's assistance and adherence to the health and safety protocols listed above as we collectively continue trying to close the spread of COVID-19 in Los Angeles County. Please note that unless written confirmation is received by 5:00 p.m. on July 30, 2020 that Grace Community

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[59] (Board of Elders, *Christ, not Caesar, Is Head of the Church: A Biblical Case for the Church's Duty to Remain Open*, GRACE COMMUNITY CHURCH (Jul. 24, 2020), https://bit.ly/2PLvkD9.)

[60] (Pastor John MacArthur, *We Must Obey God Rather Than Men*, GRACE TO YOU (Jul. 26, 2020), https://bit.ly/3fMSLpX.)

> Church will comply with the law, the County will pursue further action through all available avenues of relief. (Ex. 5-1.)

117. Grace Community Church has continued permitting its members to worship, including on Sunday, August 2 and Sunday, August 9. It intends to continue doing so.

FIRST CLAIM FOR RELIEF

Free Exercise and Enjoyment of Religion without Discrimination or Preference: Article I, Section 4, of the California Constitution

(By all Plaintiffs against all Defendants)

118. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

119. In California "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed." (Cal. Const., art. I, § 4.)

120. "In general, the religion clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution." (*Carpenter v. City and County of San Francisco* (9th Cir. 1996) 93 F.3d 627, 629.) Courts "therefore review [a] challenge. . . under the free exercise clause of the California Constitution in the same way [they] might have reviewed a similar challenge under the federal Constitution after *Sherbert*, and before *Smith*. In other words, we apply strict scrutiny." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562 [citations omitted].) To satisfy strict scrutiny, if governmental action burdens religious rights, the "government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." (*Espinoza v. Montana Dep't of Revenue* (2020) 140 S.Ct. 2246, 2260.)

121. Defendants' mandates prohibit Plaintiffs from engaging in religious worship. Engaging in worship is the most fundamental right protected by the Free Exercise of Religion. Thus, prohibiting Plaintiffs from worshipping burdens their religious rights.

122. Defendants' mandates do not further an "interest[] of the highest order" for the simple fact that, as explained above, the cure has become more deadly than the disease. The "COVID-19 suicide pandemic" is greater than the COVID-19 pandemic.

123. Defendants' mandates are not "narrowly tailored" to further any compelling governmental interest. Defendants have granted numerous special exemptions to their bans on public gatherings and conduct, including for purportedly "essential" businesses and activities, including, for example, cannabis dispensaries, abortion and other medical providers, daycare and childcare, and shopping. Defendants have also provided a *de facto* exemption for protests against the unjust death of George Floyd, without extending the same solicitude to Plaintiffs' religious gatherings. Since these gatherings may be permitted, there can be no doubt that Defendants must also permit Plaintiffs to engage in religious activities and services.

124. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutionally protected rights unless Defendants are enjoined from implementing and enforcing the worship bans.

125. Requiring Plaintiffs to only engage in state-approved religious worship, such as outdoors, or without singing, or without the full congregation in attendance, violates Plaintiffs' free exercise rights under the California Constitution. This burdening cannot satisfy strict scrutiny because California permits other industries and activities to proceed unhindered.

126. Plaintiffs have found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney fees and costs pursuant to Code of Civil Procedure Section 1021.5.

SECOND CLAIM FOR RELIEF

Right to Liberty and Substantive Due Process:

Article I, Sections 1 and 7, of the California Constitution

(By all Plaintiffs against all Defendants)

127. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

128. In California, "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I, § 1.) "A person may not be deprived of life, liberty, or property without due

process of law" (Cal. Const., art. I, § 7.)

129. Federal courts in California have found that Public Health Officials could not quarantine 12 blocks of San Francisco Chinatown because of only nine deaths due to the bubonic plague. (See *Jew Ho v. Williamson* (C.C. Cal. 1900) 103 F. 10; *Wong Wai v. Williamson* (C.C. Cal. 1900) 103 F. 1.)

130. In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000 people living in the twelve blocks of San Francisco Chinatown who were to be quarantined. The courts found it unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths. This was one death for every 1,666 inhabitants of Chinatown.

131. In *Jew Ho*, the court stated that it was "purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the personal liberty of complainant" who had "never had or contracted said bubonic plague; that he has never been at any time exposed to the danger of contracting it, and has never been in any locality where said bubonic plague, or any germs of bacteria thereof, has or have existed." (*Jew Ho*, *supra*, 103 F. 10.)

132. To justify restricting liberty, California courts require that there being "reasonable grounds [] to support the belief that the person so held [quarantined] is infected." (*Ex parte Martin* (1948) 83 Cal.App.2d 164.) Public Health Officials must be able to show "probable cause to believe the person so held has an infectious disease. . . ." *Id.* "[A] mere suspicion [of a contagious disease], unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all *for depriving persons of their liberty* and subjecting them to virtual imprisonment under a purported order of quarantine." (*Ex parte Arta* (1921) 52 Cal.App. 380, 383 [emphasis added].)

133. As stated above, as of August 2020, the probability of dying of COVID-19 is approximately half that of other leading causes of death, including heart attacks.

134. Plaintiffs have never had or contracted said coronavirus, and are unaware of any member of their Church having tested positive for the coronavirus.

135. Requiring Plaintiffs to abstain from religious worship violates their California Constitutional liberty and due process rights.

136. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutionally protected rights unless Defendants are enjoined from implementing and enforcing the worship bans.

137. Plaintiffs have found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees and costs pursuant to Code of Civil Procedure Section 1021.5.

THIRD CLAIM FOR RELIEF

Liberty of Speech: Article I, Section 2, of the California Constitution

(By all Plaintiffs against all Defendants)

138. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

139. In California, "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2.)

140. "The California Supreme Court has recognized that the California Constitution is 'more protective, definitive and inclusive of rights to expression and speech' than the First Amendment to the United States Constitution." (*Rosenbaum v. City and County of San Francisco* (9th Cir. 2007) 484 F.3d 1142, 1167.) "[A]rticle I's right to freedom of speech, unlike the First Amendment's, is unbounded in range" "and "'unlimited' in scope." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 492–493.)

141. Defendants' mandates violate the Liberty of Speech clause, both facially and as-applied to Plaintiffs.

142. Under Defendants' mandates, public gatherings and worship services are prohibited.

143. Plaintiffs engage in protected speech through worship, religious discussions, singing hymns, spiritual counseling, and praying with their congregation.

144. Defendants' imposition of their mandates is unreasonable and has a chilling effect on protected speech by outright banning in-person church services at the pain of criminal

penalty.

145. Defendants' mandates are unconstitutionally overbroad, and therefore void as a matter of law, both on their faces, and as it is applied.

146. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutionally protected rights unless Defendants are enjoined from implementing and enforcing the worship bans.

147. Plaintiffs have found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees and costs pursuant to Code of Civil Procedure Section 1021.5.

FOURTH CLAIM FOR RELIEF

Equal Protection Clause: Article I, Section 7, of the California Constitution

(By all Plaintiffs against All Defendants)

148. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

149. In California "[a] person may not be . . . denied equal protection of the laws." (Cal. Const., art. I, § 7.) "California's equal protection laws possess an independent validity from the Fourteenth Amendment." (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 893.)

150. Defendants' mandates violate Article I, section 7, of the California Constitution, both facially and as-applied to Plaintiffs.

151. The equal protection of the laws assures that people who are similarly situated for purposes of a law are generally treated similarly by the law.

152. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [citations omitted]; see also *DiMartile v. Cuomo* (N.D.N.Y. 2020), No. 1:20-CV-0859 (GTS/CFH), 2020 WL 4558711, at *10 [pandemic restrictions violated equal protection guarantees]; *Deese v. City of Lodi* (1937) 21 Cal.App.2d 631,

635 [health restrictions which did not apply to certain industries violated equal protection guarantees].)

153. Under Article I of the California Constitution, people have the right to come together, to assemble freely, and to exercise freely and enjoy their religion without discrimination or preference.

154. Plaintiffs are being treated differently from other similarly situated groups and people who are assembling and exercising their constitutional rights under Article I of the California Constitution. Defendants admitted that religious worshippers were similarly situated to political protestors when it created a uniform regime to similarly regulate both activities starting on May 25, 2020.

155. But starting on July 13, while protestors were allowed to assemble and exercise their rights to petition under Article I, Plaintiffs were not allowed to similarly exercise their rights to worship freely and enjoy their religion. Plaintiffs are being discriminated against and protestors are being given preference—even though both are engaged in activities absolutely protected by Article I of the California Constitution, and Defendants admitted they were similarly situated.

156. Additionally, Plaintiff Grace Community Church is a corporation. As a corporation, it is in a similarly situated group as other corporations in California. However, while many corporations are allowed to have people inside of their buildings, Grace Community Church is deprived of that right.

157. Plaintiff Grace Community Church is being discriminated against because it is not permitted to have people inside of its building. Preferential treatment is being given to corporations, which Defendants arbitrarily categorize as "essential", such as Costco, Walmart, Target, Albertsons, Stater Bros, Trader Joes, Sprouts, Macys, Nike, Gap, Gucci, and numerous other retail stores. All of these stores are allowed to have people indoor at either their retail stores, warehouses, or manufacturing plants. On the other hand, churches are categorized as "non-essential" insofar that their followers are not allowed to attend "indoor" worship services.

158. Defendants intentionally and arbitrarily categorize entities, individuals, and conduct as either "essential" or "non-essential." Those entities and persons classified as

"essential"—or as participating in essential services—are permitted to go about their business and activities. Those classified as "nonessential"—or as engaging in non-essential activities—are required to stay home unless it becomes necessary for them to leave for one of the enumerated "essential" activities.

159. Requiring Plaintiffs to abstain from religious worship violates their California Constitutional equal protection rights.

160. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutionally protected rights unless Defendants are enjoined from implementing and enforcing the worship bans.

161. Plaintiffs have found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees and costs pursuant to Code of Civil Procedure Section 1021.5.

FIFTH CLAIM FOR RELIEF

Separation of Powers, Non-Delegation Doctrine: Article III, Section 3, of the California Constitution

(By all Plaintiffs against the California State Defendants)

162. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

163. The Separation of Powers Clause of the California Constitution is an express separation-of-powers provision not found in the U.S. Constitution and many other state constitutions: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

164. Under Article III of the California Constitution, if the state legislature delegates to the Governor or the executive branch the power to restrict civil liberties, strict scrutiny applies. The legislative delegation must be narrowly tailored to meet a compelling state interest.

165. Nearly 6 months ago, on March 4, 2020, Governor Newsom declared a State of Emergency in response to COVID-19 under the California Emergency Services Act, sections

8565 through 8574 of the Government Code.

166. On March 19, 2020, in reliance on sections 8567 and 8267 of the Government Code, Government Newsom promulgated Executive Order N-33-20, which delegated wholesale authority to non-elected decisionmakers in the California Department of Public Health ("CDPH") to fashion the state's protocols for creating and enforcing restrictions related to COVID-19.

167. In doing so, the Executive Order grants CDPH with complete discretion to decide fundamental issues of policy that surround the controversial topic of restricting how people may worship. These issues include questions related to how churches and their flock can and should worship, whether the public has a right to worship *inside* of their churches, whether people can sing while they worship, as well as the appropriate level of restrictions relating to how, when, and where people worship.

168. Then, on July 13, 2020, then-CDPH Director, Sonia Angell—relying on Executive Order N-33-20—ordered "places of worship" to close indoor operations—putting them in the same category as "gyms and fitness centers," "offices for non-Critical Infrastructure sectors," "massage parlors, and tattoo parlors," "hair salons and barbershops, and malls." (Ex. 1-13.)

169. Non-elected decisionmakers in the CDPH are making judgments about what is important to a certain religion and what is not. But these decisions need to be made by the religions themselves—not the government. (See Cal. Const., art. I, § 4.)

170. Additionally, Governor Newsom's and the CDPH's orders' failure to address these fundamental policy issues has resulted in a complete lack of ascertainable standards to contain and guide CDPH's exercise of delegated power to fashion restrictions on worship.

171. The consequence of Governor Newsom declaring a State of Emergency in response to COVID-19 under the California Emergency Services Act, sections 8565 through 8574 of the Government Code, has resulted in deprivation of civil liberties.

172. However, sections 8565 through 8574 of the Government Code are not narrowly tailored to meet a compelling state interest because these sections lack legal text limiting the

Governor's and executive branch's restriction of civil liberties to the "the least restrictive alternative" or something similar—as found, for example, for court appointment of conservators in section 1800.3 of the Probate Code.

173. Under the California Constitution, the legislature cannot delegate legislative power to the Governor or executive branch to restrict civil liberties without "the least restrictive alternative" legal text or something similar.

174. As a result of the absence of this limiting language, the statutes and actions under the statutes restricting civil liberties violates the Separation of Powers Clause in California's Constitution.

SIXTH CLAIM FOR RELIEF

Separation of Powers, Ban on Legislative Vetoes:

Article III, Section 3, of the California Constitution

(By all Plaintiffs against the California State Defendants)

175. Plaintiffs incorporate by reference all allegations contained in the preceding paragraphs as though fully set forth herein.

176. The Separation of Powers Clause of the California Constitution is an express separation-of-powers provision not found in the U.S. Constitution and many other state constitutions: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

177. Under Article IV of the California Constitution, the state legislature passes the bills and presents them to the Governor under the Presentment Clause.

178. On March 4, 2020, Governor Newsom declared a State of Emergency in response to COVID-19 under the California Emergency Services Act, sections 8565 through 8574 of the Government Code.

179. The termination of such emergency power is subject to a legislative veto in section 8629 of the Government Code, "All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated

. . . by concurrent resolution of the Legislature."

180. Such a legislative veto violates the Article III separation of powers provision and the Article IV Presentment Clause.

181. The legislative veto of section 8269 is not severable because the legislative intent was to ensure that the legislature had input in terminating a state of emergency.

182. As a result, the statutes and actions restricting civil liberties violate the Separation of Powers Clause in California's Constitution. Therefore, the Governor's emergency orders are themselves invalid.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment against Defendants and request the following relief:

A. An order and judgment declaring that the Executive Orders, facially and as-applied to Plaintiffs, violate Article I, Sections 1, 2, 4, and 7 of the California Constitution, and Article III, Section 3 of the California Constitution;

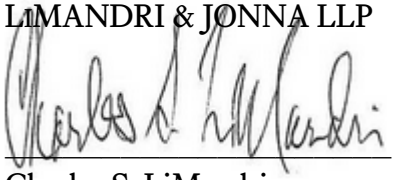
B. An order temporarily, preliminarily, and permanently enjoining and prohibiting Defendants from enforcing their coronavirus pandemic regulations against Plaintiffs;

C. For attorneys' fees and costs; and

D. Such other and further relief as the Court deems appropriate and just.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: August 12, 2020 By: 

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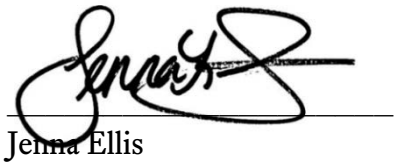
THOMAS MORE SOCIETY

Dated: August 12, 2020 By: 

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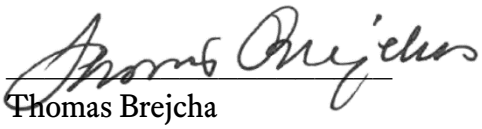
Attorneys for Plaintiffs

THOMAS MORE SOCIETY

Dated: August 12, 2020 By: 

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