UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CROSS CULTURE CHRISTIAN CENTER, a California Non-Profit Corporation; PASTOR JONATHAN DUNCAN, an individual,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; SONIA ANGELL, in her capacity as California Public Health Officer; MAGGIE PARK, in her official capacity as Public Health Officer, San Joaquin County; MARCIA CUNNINGHAM, in her official capacity as Director of Emergency Services, San Joaquin County; CITY OF LODI; TOD PATTERSON, in his official capacity as Chief of Police of Lodi, California,

Defendants.

No. 2:20-cv-00832-JAM-CKD

ORDER DENYING EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

Cross Culture Christian Center ("Cross Culture Christian" or the "Church") and its pastor, Jonathan Duncan, filed a ten-count

complaint against the City of Lodi, its police chief, and several State and County officials. Compl., ECF No. 1. They allege the stay-at-home orders Governor Newsom and San Joaquin County enacted to slow the spread of COVID-19 ("State Order" and "County Order") impermissibly infringe upon their constitutional and statutory rights to speak, assemble, and practice religion as they choose. Plaintiffs then filed an ex parte application for a temporary restraining order. Ex parte Application for TRO ("TRO"), ECF No. 4. They request the Court enjoin enforcement of the State and County orders against Cross Culture Christian so long as the church complies with the CDC's social distancing guidelines while conducting its in-person services.[1] TRO at 2. The State Defendants opposed Plaintiffs' motion. Opp'n by Sonia Angell, Xavier Becerra, Gavin Newsom ("State Opp'n), ECF No. 15. The County and City Defendants filed a joint opposition. Opp'n by City of Lodi, et al. ("Local Opp'n"). The Court also granted leave for Americans United for the Separation of Church and State to file a brief as amicus curiae in support of Defendants. ECF No. 18. Plaintiffs then filed a reply. ECF No. 21.

For the reasons set forth below, the Court DENIES Plaintiffs' request for a temporary restraining order.

I. FACTUAL BACKGROUND

Cross Culture Christian is a church in Lodi, California led by Pastor Duncan. Compl. ¶¶ 17, 18. Cross Culture Christian used to hold Wednesday and Sunday services in the sanctuary of a building it rented from Bethel Open Bible Church. Compl. ¶ 56.

[1] Plaintiffs' ex parte application was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

But in March 2019, Governor Newsom and San Joaquin County began issuing stay at home orders to combat the rapid spread of COVID-19. Compl. ¶¶ 31, 36. The Lodi Police Department, enforcing these orders, eventually required the Church to stop holding in-person services. Compl. ¶ 75.

In early March, Governor Newsom enacted Executive Order N-33-20, a statewide "stay at home order." Compl. ¶ 31. The order directed California residents to "stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure services." Compl. ¶ 32; Ex. A to Compl., ECF No. 1-1. Governor Newsom reserved authority to "designate additional sectors as critical [to] protect the health and well-being of all Californians." Id. On March 21, San Joaquin County followed suit. Compl. ¶ 36. It issued a stay at home order directing "all businesses and governmental agencies to cease non-essential operations at physical locations in the county" and prohibiting "all non-essential gatherings of any number of individuals." Ex. 2 to Compl., ECF No. 1-2. The County order also incorporated Executive Order N-33-20 by reference. Id. at 1.

As COVID-19 continued to spread, Governor Newsom and County officials issued amendments containing increasingly stringent restrictions. Compl. ¶¶ 31-46. California's March 22 order set forth with more specificity its list of "Essential Critical Infrastructure Workers." Compl. ¶ 33; Ex. 6 to Compl., ECF No. 1-6. The amendment designates "[f]aith based services that are provided through streaming or other technology" as an essential part of the "Other Community-Based Government Operations and

Essential Functions" sector. Ex. 6 to Compl. at 11. The list otherwise makes no mention of faith, churches, religion, religious workers, Christianity, worship, or prayer. The County's March 26 order removed an exemption in the earlier order that allowed six or fewer nonrelatives to meet at someone's home or place of residence. Ex. 3 to Compl., ECF No. 1-3. Cross Culture Christian nevertheless continued to hold in-person services throughout the month of March. Compl. ¶¶ 63-65.

In response to the Church's continued operation, three Lodi police officers posted a notice on the building, explaining that its non-essential use of the facility was a public nuisance. Compl. ¶ 73. Two days later, on April 3, a County Public Health Officer issued an Order Prohibiting Public Assembly to the Church's lessor, Bethel Open Bible Church. Compl. ¶ 43; Ex. 4 to Compl., ECF No. 1-4. The order stated that allowing a tenant to hold in-person services violated the State and County stay at home orders. The order concluded, "[a]ny person who refuses or willfully neglects to comply with this emergency order is guilty of a misdemeanor, punishable by fine and/or imprisonment." Id. Bethel Open Bible Church could, however, continue to operate its child-care facility "consistent with the order of the State Public Health Officer." Id.

The following Sunday, Duncan returned to Cross Culture Christian. His landlord had changed the locks. Compl. ¶ 75. Lodi law enforcement barred access to the property under threat of citation. Compl. Id.

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II. OPINION

A. Judicial Notice

District courts may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). To this end, a court may take judicial notice "of court filings and other matters of public record," Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006), including "government documents available from reliable sources on the internet," California River Watch v. City of Vacaville, No. 2:17-cv-00524-KJM-KJN, 2017 WL 3840265, at *2 n.1 (E.D. Cal. Sept. 1, 2017).

The State Defendants request the Court take judicial notice of various filings, rulings, and hearing transcripts related to motions for temporary restraining orders in the following cases: Gish v. Newsom, No. 5:20-cv-00755-JGB-KK (C.D. Cal.); Abiding Place Ministries v. Wooten, No. 3:20-cv-00683-BAS-AHG (S.D. Cal.); Nigen v. New York, No. 1:20-cv-01567-EK-PK (E.D.N.Y.); Tolle v. Northam, No. 1:20-cv-00363-LMB-MSN (E.D. Va.); Binford v. Sununu, NO. 217-2020-cv-00152 (N.H. Sup. Ct.); On Fire Christian Ctr., Inc. v. Fischer, No. 3:20-cv-264-JRW (W.D. Ky.); Temple Baptist Church v. City of Greenville, No. 4:20-cv-00064-DMB-JMV (N.D. Miss.). Grabarsky Decl. to State Opp'n ¶¶ 8-14, ECF No. 15-1. The City and County Defendants ("Local Defendants") request judicial notice of the following documents issued by the state and federal government:

- State of California's Proclamation of a Statewide Emergency, from the Executive Department, State of California, signed by Governor Gavin Newsom on March 4, 2020;
- State of California Department – Health and Human Services Agency, California Department of Public Health, Public Guidance for the Prevention of COVID-19 Transmission for Gatherings, dated March 16, 2020;
- Executive Order N-33-20, from the Executive Department of the State of California, signed by Governor Gavin Newsom on March 19, 2020;
- U.S. Department of Homeland Security Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, from Director Christopher C. Krebs, dated March 28, 2020; and
- State of California Public Health Officer Designation of Essential Critical Infrastructure Workers, dated April 28, 2020.

Local Defendants' Request for Judicial Notice, ECF No. 17.

The court filings and government documents Defendants reference are all proper subjects of judicial notice. The Court therefore GRANTS Defendants' requests. In doing so, the Court judicially notices "the contents of the documents, not the truth of those contents." Gish v. Newsom, No. EDCV 20-755-JGB(KKx), at *2 (C.D. Cal. April 23, 2020).

B. Legal Standard

A party seeking a temporary restraining order must establish (1) he is likely to succeed on the merits; (2) he is

likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see also Stuhlbarg Intern Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001). In the Ninth Circuit, courts may also issue temporary restraining orders when there are "serious questions going to the merits" and a "balance of hardships that tips sharply towards the plaintiff" so long as the remaining two Winter factors are present. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). When applying either test, courts operate with the understanding that a temporary restraining order, much like a preliminary injunction, is an "extraordinary and drastic remedy." Cf. Munaf v. Geren, 553 U.S. 674, 690 (2008). "The propriety of a temporary restraining order, in particular, hinges on a significant threat of irreparable injury [] that must be imminent in nature." Gish, No. EDCV 20-755-JGB(KKx), 2020 WL 1979970, at *3 (April 23, 2020) (citing Simula, Inc. v. Autoliv, Inc., 175 F.3d. 716, 725 (9th Cir. 1999); Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988)).

C. Analysis

Plaintiffs request the Court enjoin Defendants from enforcing the State and County stay at home orders against the Church's biweekly in-person services. TRO at 1-2. Plaintiffs contend they satisfy each of the four conventional Winter factors. If allowed to resume in-person services, Plaintiffs maintain they would "follow CDC guidelines and San Joaquin

County social distancing protocols in the use of their sanctuary for assemblies and their parking lot for drive-in services" and would "keep their assemblies under 50 persons until the dangers posed by COVID-19 pass." TRO at 22.[2]

But as Defendants argue, Plaintiffs cannot show they are likely to succeed on the merits of the two claims referenced in their motion for temporary restraining order. See TRO at 6-18. As an initial matter, both stay at home orders flow from valid exercises of state and local emergency police powers. Moreover, Plaintiffs are unlikely to show the orders violate the Free Exercise Clause or even implicate RLUIPA's protections. For the same reasons, Plaintiffs also fail to raise serious questions going to the merits of these two claims. As a result, the Ninth Circuit's "serious question" analysis does not provide them an alternative avenue for preliminary relief.

1. Likelihood of Success on the Merits / Serious Questions going to the Merits

a. Emergency Powers

Over a hundred years ago, the Supreme Court upheld a state's exercise of its general police powers to promote public safety during a public health crisis. Jacobson, 197 U.S. 11, 25

[2] After Plaintiffs filed this suit, the State and County both clarified that drive-in services are permitted under the stay at home orders provided congregants "refrain from direct or indirect physical contact" and "do not leave their cars." See State Opp'n at 4; Ex. 13 to Grabarsky Decl.; County Opp'n at 5; Ex. N to Park Decl., ECF No. 17-1. The Court denies as moot the portion of Plaintiffs' motion that seeks to temporarily enjoin either order's prohibition of drive-in services. See Bd. Of Trustees of Glazing Health and Welfare Trust v. Chambers, 941 F.3d 1195, 1199 (9th Cir. 2019).

(1905). A state's police power entails the authority "to enact quarantine laws and 'health laws of every description'"—even under normal circumstances. Id. States may invest this authority to counties and cities within their province. Id. Under normal circumstances, however, state and local regulations enacted pursuant to a general police power must, "always yield in case of conflict" to both the Constitution and permissible exercises of federal authority. Id.

But sometimes, normalcy is lost. When that occurs, "[t]he authority to determine for all what ought to be done in [] an emergency must [be] lodged somewhere or in some body." Id. at 27. It is not "unusual nor [] unreasonable or arbitrary" to invest that authority in the state, for "[a] community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Id. In view of this principle, when a state or locality exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are "beyond all question" a "plain, palpable invasion of rights secured by [] fundamental law." Id. at 30.[3]

[3] Even with a hundred years of hindsight, courts continue to adopt Jacobson's benchmark when reviewing emergency public health measures enacted pursuant to emergency police powers. See, e.g., Gish, 2020 WL 1979970, at *5 (citing Jacobson, 197 U.S. at 31); Robinson v. Attorney General, No. 20-11401-B, WL 1952370, at *8 (11th Cir. April 23, 2020) (same); In re Abbott, No. 20-50296, 2020 WL 1911216, at *16 (5th Cir. 2020); Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *40 (D. N.M. April 17, 2020) (same); Hickox v. Christie, 205 F.Supp.3d 579, 591-93 (D. N.J. 2016) (same).

This Court finds the State and County stay at home orders being challenged here bear a real and substantial relation to public health. Arguing otherwise, Plaintiffs contend Cross Culture Christian's biweekly services "do not pose a unique or unacceptable threat to public health and safety"—"[i]n fact, the Church . . . is much safer than shopping at Costco, Walmart, or Home Depot in Lodi." TRO at 20. This argument is unpersuasive for the following reasons. First, it assumes that the State and County's designation of essential activities turns solely upon people's ability to comply with the CDC guidelines while engaged in those activities. Not so. The State's order expressly states it took other considerations into account, i.e., continuing non-COVID-19 emergency services, providing clean water, protecting the state's supply chains, etc. See Ex. 6 to Compl.

Second, Plaintiffs' argument ignores Jacobson's mandate that, during public health crises, "it is no part of the function of a court... to determine which of two modes was likely to be the most effective for the protection of the public against disease." Jacobson, 197 U.S. at 30; see also In re Abbott, 954 F.3d at 777. Starting in December 2019, "California began working closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments to monitor and plan for the potential spread of COVID-19." State Opp'n at 3 (citing Grabarsky Decl). The State and County orders flow from the information those experts provided. Id. at 3-4. To successfully argue the State and County orders do not reflect

reasoned responses to the COVID-19 pandemic, plaintiffs must do more than contend they would have done things differently. Jacobson, 197 U.S. 30. Plaintiffs here did not carry that burden.

Finally, Plaintiffs failed to produce any evidence that their in-person gatherings pose little threat of increasing COVID-19's spread. "Because asymptomatic and pre-symptomatic carriers of the virus can infect others," Plaintiffs' belief that the Church's congregants "have never had or contracted [] coronavirus . . . never been at any time exposed to the danger of contracting it, and [] never been in any locality where [] coronavirus . . . has [] existed," is "largely meaningless." Gish, 2020 WL 1979970, at *4. Indeed, the known reality of how unknown carriers transmit this highly-infectious disease further belies Plaintiffs' argument. See State Opp'n at 9; Brief of Amicus Curiae Americans United for Separation of Church and State at 17-18 ("Americans United Amicus"), ECF No. 9-1; see also Hilda Flores, One-third of COVID-19 cases in Sac County tied to church gatherings, officials say, KCRA (Apr. 1, 2020, 2:55 PM)[4]; Tony Bizjak, et al., 71 infected with coronavirus at Sacramento church. Congregation tells county 'leave us alone', SACRAMENTO BEE (Apr. 2, 2020)[5]; Richard Read, A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead, L.A. TIMES (March 29, 2020)[6]; Bailey Loosmore &

[4] Available at https://www.kcra.com/article/sacramento-county-one-third-of-covid-19-cases-tied-church-gatherings-officials-say/32011107#.

[5] Available at https://www.sacbee.com/news/coronavirus/article241715346.html.

[6] Available at https://www.latimes.com/world-nation/story/2020-

Mandy McLaren, Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020)[7]. Plaintiffs claim their in-person gatherings pose no greater threat to life than the activities the State and County orders permit. TRO at 20. But as the Central District of California recently explained: even if holding in-person services is just as safe as keeping grocery stores open, people will die. Gish, 2020 WL 1979970, at *6 (citing Dalvin Brown, COVID-19 Claims Lives of 30 Grocery Store Workers, Thousands More May Have It, Union Says, USA TODAY, (last accessed April 23, 2020))[8].

Even in times of health, government officials must often strike the delicate balance between ensuring public safety and preserving the Constitution's fundamental guarantees. The judiciary plays an important role in ensuring that balance is permissibly struck. But during public health crises, new considerations come to bear, and government officials must ask whether even fundamental rights must give way to a deeper need to control the spread of infectious disease and protect the lives of society's most vulnerable. Under these rare conditions, the judiciary must afford more deference to officials' informed efforts to advance public health—even when those measures encroach on otherwise protected conduct; even

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03-29/coronavirus-choir-outbreak.

[7] Available at https://www.courier-journal.com/story/news/2020/04/01/coronavirus-kentucky-church-revival-leads-28-cases-2-deaths/5108111002/

[8] Available at https://www.usatoday.com/story/money/2020/04/14/coronavirus-claims-lives-30-grocery-store-workers-union-says/2987754001/.

when thoughtful minds could disagree about how to best balance the scales. See Jacobson, 197 U.S. at 28-32, 34-38; Gish, 2020 WL 1979970, at *4-5.

The State and County bans on mass gatherings such as sporting events, concerts, dining rooms, and in-person church services flow from a larger goal of substantially reducing in-person interactions. See State Opp'n at 14. Plaintiffs fail to show this goal, and the means used to achieve it, do not bear a "real and substantial relationship" to preventing widespread transmission of COVID-19. See Jacobson, 197 U.S. at 30. Moreover, as explained below, Plaintiffs do not show the orders are "beyond all question" a "plain, palpable invasion of rights secured by [] fundamental law." Id. at 30. The Court finds Plaintiffs are not likely to succeed on the merits of their challenge to the State and County stay at home orders as impermissible exercises of emergency police powers.

b. Free Exercise Clause

The First Amendment, as incorporated against states through the Fourteenth Amendment, protects the "free exercise" of religion. U.S. CONST. Amend. 1; Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940). The Free Exercise Clause guards individuals from state interference when exercising sincerely-held religious beliefs. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). "[R]eligious beliefs need not be acceptable logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. (quoting Thomas v. Review Bd. of Indiana Employ. Sec. Div., 450 U.S. 707, 714 (1981). Laws and

ordinances that "single[] out" a religious practice for discriminatory treatment "must undergo the most rigorous of scrutiny." Id. at 538, 546.

But the understandably cherished freedom to exercise sincerely-held religious beliefs "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." County Opp'n at 10 (quoting Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1075-76 (9th Cir. 2015); State Opp'n at 13 (same). More specifically, when a neutral law of general application places incidental limits on a religious exercise, "the right to practice religion freely does not include liberty to expose the community . . . to communicable disease." Legacy Church, 2020 WL 1905586, at *30 (quoting Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)). Courts look to both the text and the effect of a law to determine whether it is neutral and generally applicable. Parents for Privacy v. Barr, 949 F.3d 1210, 1234 (9th Cir. 2020).

The Court first finds that the State and County orders are neutral. [T]he minimum requirement of neutrality is that a law not discriminate on its face." Church of Lukumi, 508 U.S. at 533. Plaintiffs contend the State and County orders facially discriminate against religious gatherings because they "prohibit all 'faith based' assemblies even if they strictly follow CDC and social distancing guidelines." TRO at 8. To be clear, the State and County orders direct all residents to stay home "except as needed to maintain continuity of operations" for state- and locally-designated sectors. Exs. 5-6 to Compl. The orders then dub "[f]aith based services that are provided

through streaming or other technology" as essential. Id. They do not, however, include in-person religious assemblies in their list of exemptions. Now properly situated, the Court does not find this qualifies as facially discriminatory text. "Facial neutrality does not require freedom from any mention of religion." Gish, 2020 WL 1979970, at *6. Rather it prohibits laws from targeting "religious practice[s], conduct, belief[s], or motivation[s]." Stormans, 794 F.3d at 1076. The face of the orders prohibit all non-essential gatherings. Exs. 5-6 to Compl. The exempted categories of "essential" conduct include religious and secular activities; as do the non-exempted categories. Exs. 1, 5-6 to Compl. Looking only to the text of the orders, the Court does not find that the orders' exemptions discriminate on the basis of religion.

Admittedly, "[f]acial neutrality is not determinative"; the Free Exercise Clause also "forbids subtle departures from neutrality." Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1731 (2018) (quoting Church of Lukumi, 508 U.S. at 534). "Apart from the text, the effect of a law in its real operation is strong evidence of its object." Church of Lukumi, 508 U.S. at 535. Courts will not endorse a law as neutral if, by design, the law works to target religious conduct. Id. Plaintiffs contend the State and County order so target in-person church services. TRO at 10. They argue that, by proscribing faith-based gatherings and assemblies but permitting "a host of comparable secular places where people gather and assemble," the orders have fashioned a "religious gerrymander" akin to the one struck down in Church of Lukumi,

508 U.S. 534.

But when Plaintiffs argue that church "is the only [] 'essential service' on the state list that is required to limit its core practice [] to electronic communication", Reply at 1, they ignore that all comparable assemblies are completely prohibited. Grocery stores, liquor stores, and marijuana dispensaries are not the proper point of comparison. "[I]ndividuals enter [these stores] at various times to purchase various items; they move around the store individually . . . and they leave when they have achieved their purpose." Maryville Baptist Church, Inc. v. Beshear, No. 3:20-cv-278-DJH, 2020 WL 1909616, at *2 (W.D. Ky Apr. 18, 2020). In-person church services, on the other hand, are "by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose." Id. By Plaintiffs' own admission, they seek to assemble, in part, for the sake of assembling. Compl. ¶ 58 ("The Church has a sincerely and deeply held religious belief that it is essential for them as Christians to assemble and regularly gather together in person for the teaching of God's Word, prayer, worship, baptism, communion, and fellowship."). Consequently, "a more apt comparison . . . is a restaurant[,] entertainment venue . . . movie, concert, or sporting event." Id. Like in-person church services, the State and County orders temporarily prohibit all these activities. State Opp'n at 14-15; County Opp'n at 11-12. The State and County orders are neutral both on their face and in their application.

The Court also finds the orders are generally applicable.

"All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." Church of Lukumi, 508 U.S. at 542. Selectivity strips a law of its general application when the law's restrictions "substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." Stormans, 794 F.3d at 1079. Courts suspect impermissible animus toward religion when the government interest advanced "is worthy of being pursued only against conduct with a religious motivation." Church of Lukumi, 508 U.S. at 542.

Plaintiffs claim "people are regularly gathering and assembling at numerous commercial and transportation locations," and that the State and County orders "allow[] them to do so all day long." TRO at 11. These gatherings, they argue, are non-religiously motivated conduct that endangers the same governmental interest the orders claim to protect. Id. But courts only "compare the prohibited religious conduct with analogous secular conduct when assessing underinclusivity." Gish, 2020 WL 1979970, at *6 (citing Stormans, 794 F.3d at 1079) (emphasis added). And as previously explained, the type of gathering that occurs at in-person religious services is much more akin to conduct the orders prohibit—attending movies, restaurants, concerts, and sporting events—than that which the orders allow.

The orders are no less generally applicable because the City of Lodi enforced them against Pastor Duncan. Plaintiffs

have not produced any evidence that the City only enforced the stay at home orders against religious entities. See Local Opp'n at 12-13. Indeed, the City contends it issued Orders Precluding Public Assembly "to any property owner in the County where the County [had] knowledge that a gathering in violation of the Public Health Orders likely took place." Local Opp'n at 12. On the admittedly thin record before the Court, nothing supports a finding that Lodi targeted the Church because of its religious status rather than because it violated the law. See Americans United Amicus at 10. The Court therefore finds the State and County orders are generally applicable.

Being neutral laws of general applicability, the State and County stay at home orders are only subject to rational basis review. Church of Lukumi, 508 U.S. at 543. This standard requires a law be "rationally related to a legitimate governmental purpose." Stormans, 794 F.3d at 1084. "Plaintiffs 'have the burden to negat[e] every conceivable basis which might support [the rules].'" Id. (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993). Plaintiffs did not meet that burden here. Accordingly, they are not likely to succeed on their Free Exercise claim.

"The Free Exercise Clause commits government [] to religious tolerance." Church of Lukumi, 508 U.S. at 547. "[E]ven slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." Church of Lukumi, 508 U.S. at 547. This Court has so paused. But the incidental—

albeit uncomfortable—burden the State and County orders place on the exercise of religion simply do not engender the type of religious discrimination the Constitution aims to prevent. The State and County orders are not unconstitutional. Rather they are permissible exercises of emergency police powers especially given the extraordinary public health emergency facing the State. Plaintiffs are not entitled to a temporary restraining order enjoining the application of State and County orders protecting the public health from a virulently infectious and frequently deadly disease. Their challenge to these COVID-19-related public health orders is therefore denied.

c. Religious Land Use and Institutionalized Persons Act (RLUIPA)

RLUIPA restricts state and local governments' ability to "impose or implement land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc(a)(1). If a land use regulation imposes a "substantial burden," the government must show the imposition of that burden is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc(a)(1)(A),(B). RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law." 42 U.S.C. § 2000cc-5(5). The State and County stay at home orders regulate conduct, not land use. See Exs. 5-6 to Compl. Plaintiffs fail to identify any cases where a court has upheld a challenge under this provision to a conduct-regulating statute. Indeed, interpreting RLUIPA to regulate conduct in this way would raise constitutional questions about the law's congruence

and proportionality. See Guru Nanak Sikh Soc. Of Yuba City v. County of Sutter, 456 F.3d 978, 986 (9th Cir. 2006) (citing Cutter v. Wilkinson, 544 U.S. 709 (2005))("To avoid RFRA's fate, Congress wrote that RLUIPA would apply only to regulations regarding land use and prison conditions.") Employing the canon of constitutional avoidance, this Court finds RLUIPA, by its own terms, does not apply to the State and County orders. Plaintiffs are therefore unlikely to succeed on the merits of this claim.

2. Remaining Factors

A district court may not grant a plaintiff's motion for a temporary restraining order if the request fails to show the plaintiff is likely to succeed on the merits of a claim or, at least, raises serious questions going to the merits of that claim. See Winter, 555 U.S. at 20; Alliance for Wild Rockies, 632 F.3d at 1135. Plaintiffs here did not make either showing. The Court need not consider the remaining factors in denying their request. Gish, 2020 WL 1979970, at *7.

III. ORDER

For the reasons set forth above, the Court DENIES Plaintiffs ex parte application for a temporary restraining order.

IT IS SO ORDERED.

Dated: May 4, 2020

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE