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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

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

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

22 I. FACTUAL BACKGROUND

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

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

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

6 In early March, Governor Newsom enacted Executive Order N-
7 33-20, a statewide "stay at home order." Compl. ¶ 31. The order
8 directed California residents to "stay home or at their place of
9 residence except as needed to maintain continuity of operations
10 of the federal critical infrastructure services." Compl. ¶ 32;
11 Ex. A to Compl., ECF No. 1-1. Governor Newsom reserved authority
12 to "designate additional sectors as critical [to] protect the
13 health and well-being of all Californians." Id. On March 21,
14 San Joaquin County followed suit. Compl. ¶ 36. It issued a stay
15 at home order directing "all businesses and governmental agencies
16 to cease non-essential operations at physical locations in the
17 county" and prohibiting "all non-essential gatherings of any
18 number of individuals." Ex. 2 to Compl., ECF No. 1-2. The
19 County order also incorporated Executive Order N-33-20 by
20 reference. Id. at 1.

21 As COVID-19 continued to spread, Governor Newsom and County
22 officials issued amendments containing increasingly stringent
23 restrictions. Compl. ¶¶ 31-46. California's March 22 order set
24 forth with more specificity its list of "Essential Critical
25 Infrastructure Workers." Compl. ¶ 33; Ex. 6 to Compl., ECF No.
26 1-6. The amendment designates "[f]aith based services that are
27 provided through streaming or other technology" as an essential
28 part of the "Other Community-Based Government Operations and

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

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

23 The following Sunday, Duncan returned to Cross Culture
24 Christian. His landlord had changed the locks. Compl. ¶ 75.
25 Lodi law enforcement barred access to the property under threat
26 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:

- 1 • State of California's Proclamation of a Statewide
2 Emergency, from the Executive Department, State of
3 California, signed by Governor Gavin Newsom on March 4,
4 2020;
- 5 • State of California Department - Health and Human Services
6 Agency, California Department of Public Health, Public
7 Guidance for the Prevention of COVID-19 Transmission for
8 Gatherings, dated March 16, 2020;
- 9 • Executive Order N-33-20, from the Executive Department of
10 the State of California, signed by Governor Gavin Newsom on
11 March 19, 2020;
- 12 • U.S. Department of Homeland Security Advisory Memorandum on
13 Identification of Essential Critical Infrastructure Workers
14 During COVID-19 Response, from Director Christopher C.
15 Krebs, dated March 28, 2020; and
- 16 • State of California Public Health Officer Designation of
17 Essential Critical Infrastructure Workers, dated April 28,
18 2020.

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

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

26 B. Legal Standard

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

1 likely to suffer irreparable harm absent preliminary relief; (3)
2 the balance of equities tips in his favor, and (4) an injunction
3 is in the public interest. Winter v. Nat. Res. Def. Council,
4 Inc., 555 U.S. 7, 20 (2008); see also Stuhlbarg Intern Sales
5 Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 839 n.7
6 (9th Cir. 2001). In the Ninth Circuit, courts may also issue
7 temporary restraining orders when there are "serious questions
8 going to the merits" and a "balance of hardships that tips
9 sharply towards the plaintiff" so long as the remaining two
10 Winter factors are present. Alliance for Wild Rockies v.
11 Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). When applying
12 either test, courts operate with the understanding that a
13 temporary restraining order, much like a preliminary injunction,
14 is an "extraordinary and drastic remedy." Cf. Munaf v. Geren,
15 553 U.S. 674, 690 (2008). "The propriety of a temporary
16 restraining order, in particular, hinges on a significant threat
17 of irreparable injury [] that must be imminent in nature."
18 Gish, No. EDCV 20-755-JGB(KKx), 2020 WL 1979970, at *3 (April
19 23, 2020) (citing Simula, Inc. v. Autoliv, Inc., 175 F.3d. 716,
20 725 (9th Cir. 1999); Caribbean Marine Serv. Co. v. Baldrige,
21 844 F.2d 668, 674 (9th Cir. 1988)).

22 C. Analysis

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

1 County social distancing protocols in the use of their sanctuary
2 for assemblies and their parking lot for drive-in services” and
3 would “keep their assemblies under 50 persons until the dangers
4 posed by COVID-19 pass.” TRO at 22.²

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

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

18 a. Emergency Powers

19 Over a hundred years ago, the Supreme Court upheld a
20 state’s exercise of its general police powers to promote public
21 safety during a public health crisis. Jacobson, 197 U.S. 11, 25
22

23 ² After Plaintiffs filed this suit, the State and County both
24 clarified that drive-in services are permitted under the stay at
25 home orders provided congregants “refrain from direct or indirect
26 physical contact” and “do not leave their cars.” See State Opp’n
27 at 4; Ex. 13 to Grabarsky Decl.; County Opp’n at 5; Ex. N to Park
28 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).

1 (1905). A state's police power entails the authority "to enact
2 quarantine laws and 'health laws of every description'"—even
3 under normal circumstances. Id. States may invest this
4 authority to counties and cities within their province. Id.
5 Under normal circumstances, however, state and local regulations
6 enacted pursuant to a general police power must, "always yield
7 in case of conflict" to both the Constitution and permissible
8 exercises of federal authority. Id.

9 But sometimes, normalcy is lost. When that occurs, "[t]he
10 authority to determine for all what ought to be done in [] an
11 emergency must [be] lodged somewhere or in some body." Id. at
12 27. It is not "unusual nor [] unreasonable or arbitrary" to
13 invest that authority in the state, for "[a] community has the
14 right to protect itself against an epidemic of disease which
15 threatens the safety of its members." Id. In view of this
16 principle, when a state or locality exercises emergency police
17 powers to enact an emergency public health measure, courts will
18 uphold it unless (1) there is no real or substantial relation to
19 public health, or (2) the measures are "beyond all question" a
20 "plain, palpable invasion of rights secured by [] fundamental
21 law." Id. at 30.³

22
23 ³ Even with a hundred years of hindsight, courts continue to
24 adopt Jacobson's benchmark when reviewing emergency public health
25 measures enacted pursuant to emergency police powers. See, e.g.,
26 Gish, 2020 WL 1979970, at *5 (citing Jacobson, 197 U.S. at 31);
27 Robinson v. Attorney General, No. 20-11401-B, WL 1952370, at *8
28 (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).

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

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

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

5 Finally, Plaintiffs failed to produce any evidence that
6 their in-person gatherings pose little threat of increasing
7 COVID-19's spread. "Because asymptomatic and pre-symptomatic
8 carriers of the virus can infect others," Plaintiffs' belief
9 that the Church's congregants "have never had or contracted []
10 coronavirus . . . never been at any time exposed to the danger
11 of contracting it, and [] never been in any locality where []
12 coronavirus . . . has [] existed," is "largely meaningless."
13 Gish, 2020 WL 1979970, at *4. Indeed, the known reality of how
14 unknown carriers transmit this highly-infectious disease further
15 belies Plaintiffs' argument. See State Opp'n at 9; Brief of
16 Amicus Curiae Americans United for Separation of Church and
17 State at 17-18 ("Americans United Amicus"), ECF No. 9-1; see
18 also Hilda Flores, One-third of COVID-19 cases in Sac County
19 tied to church gatherings, officials say, KCRA (Apr. 1, 2020,
20 2:55 PM)⁴; Tony Bizjak, et al., 71 infected with coronavirus at
21 Sacramento church. Congregation tells county 'leave us alone',
22 SACRAMENTO BEE (Apr. 2, 2020)⁵; Richard Read, A choir decided to go
23 ahead with rehearsal; Now dozens of members have COVID-19 and
24 two are dead, L.A. TIMES (March 29, 2020)⁶; Bailey Loosmore &

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

27 ⁵ Available at
28 <https://www.sacbee.com/news/coronavirus/article241715346.html>.

28 ⁶ Available at <https://www.latimes.com/world-nation/story/2020->

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

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

24 _____
25 03-29/coronavirus-choir-outbreak.

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

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

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

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

17 b. Free Exercise Clause

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

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

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

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

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

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

1 508 U.S. 534.

2 But when Plaintiffs argue that church “is the only []
3 ‘essential service’ on the state list that is required to limit
4 its core practice [] to electronic communication”, Reply at 1,
5 they ignore that all comparable assemblies are completely
6 prohibited. Grocery stores, liquor stores, and marijuana
7 dispensaries are not the proper point of comparison.
8 “[I]ndividuals enter [these stores] at various times to purchase
9 various items; they move around the store individually . . . and
10 they leave when they have achieved their purpose.” Maryville
11 Baptist Church, Inc. v. Beshear, No. 3:20-cv-278-DJH, 2020 WL
12 1909616, at *2 (W.D. Ky Apr. 18, 2020). In-person church
13 services, on the other hand, are “by design a communal
14 experience, one for which a large group of individuals come
15 together at the same time in the same place for the same
16 purpose.” Id. By Plaintiffs’ own admission, they seek to
17 assemble, in part, for the sake of assembling. Compl. ¶ 58
18 (“The Church has a sincerely and deeply held religious belief
19 that it is essential for them as Christians to assemble and
20 regularly gather together in person for the teaching of God’s
21 Word, prayer, worship, baptism, communion, and fellowship.”).
22 Consequently, “a more apt comparison . . . is a restaurant[,]
23 entertainment venue . . . movie, concert, or sporting event.”
24 Id. Like in-person church services, the State and County orders
25 temporarily prohibit all these activities. State Opp’n at 14-
26 15; County Opp’n at 11-12. The State and County orders are
27 neutral both on their face and in their application.

28 The Court also finds the orders are generally applicable.

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

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

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

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

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

22 "The Free Exercise Clause commits government [] to
23 religious tolerance." Church of Lukumi, 508 U.S. at 547.
24 "[E]ven slight suspicion that proposals for state intervention
25 stem from animosity to religion or distrust of its practices,
26 all officials must pause to remember their own high duty to the
27 Constitution and to the rights it secures." Church of Lukumi,
28 508 U.S. at 547. This Court has so paused. But the incidental-

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

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

14 RLUIPA restricts state and local governments' ability to
15 "impose or implement land use regulation in a manner that
16 imposes a substantial burden on the religious exercise of a
17 person." 42 U.S.C. § 2000cc(a)(1). If a land use regulation
18 imposes a "substantial burden," the government must show the
19 imposition of that burden is the least restrictive means of
20 furthering a compelling government interest. 42 U.S.C.
21 § 2000cc(a)(1)(A), (B). RLUIPA defines "land use regulation" as
22 "a zoning or landmarking law, or the application of such a law."
23 42 U.S.C. § 2000cc-5(5). The State and County stay at home
24 orders regulate conduct, not land use. See Exs. 5-6 to Compl.
25 Plaintiffs fail to identify any cases where a court has upheld a
26 challenge under this provision to a conduct-regulating statute.
27 Indeed, interpreting RLUIPA to regulate conduct in this way
28 would raise constitutional questions about the law's congruence

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

10 2. Remaining Factors

11 A district court may not grant a plaintiff’s motion for a
12 temporary restraining order if the request fails to show the
13 plaintiff is likely to succeed on the merits of a claim or, at
14 least, raises serious questions going to the merits of that
15 claim. See Winter, 555 U.S. at 20; Alliance for Wild Rockies,
16 632 F.3d at 1135. Plaintiffs here did not make either showing.
17 The Court need not consider the remaining factors in denying
18 their request. Gish, 2020 WL 1979970, at *7.

19
20 III. ORDER

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

23 IT IS SO ORDERED.

24 Dated: May 4, 2020

25
26 
27 **JOHN A. MENDEZ,**
28 **UNITED STATES DISTRICT JUDGE**