FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE SOUTH BAY UNITED PENTECOSTAL CHURCH; BISHOP ARTHUR HODGES III,	No. 21-70769
	D.C. No. 3:20-cv-00865-BAS-AHG
SOUTH BAY UNITED PENTECOSTAL CHURCH, a California nonprofit corporation; BISHOP ARTHUR HODGES III, an individual, *Petitioners*, v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO, *Respondent*, GAVIN NEWSOM, in his official capacity as the Governor of California; MATT RODRIGUEZ, in his official capacity as the Acting Attorney General of California; TOMAS ARAGON, in his official capacity as California Public Health Officer; WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego; HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency	ORDER

Services; WILLIAM D. GORE, in his official capacity as Sheriff of the County of San Diego,
Real Parties in Interest.

Petition for Writ of Mandamus

Submitted April 2, 2021*

Filed April 2, 2021

Before: Kim McLane Wardlaw and Richard R. Clifton, Circuit Judges, and Timothy Hillman,** District Judge.

Order

SUMMARY***

Civil Rights

The panel denied, without prejudice, an Urgent Petition for Writ of Mandamus under Circuit Rule 27-3(b), filed on March 30, 2021 by South Bay United Pentecostal Church

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Timothy Hillman, United States District Judge for the District of Massachusetts, sitting by designation.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and Bishop Arthur Hodges III, which asserted that the district court erred by denying a temporary restraining order pending an evidentiary hearing.

South Bay Pentecostal Church and Bishop Arthur Hodges (collectively, "South Bay") sought an injunction against enforcement of the State of California's Covid-19 capacity restrictions on indoor worship before Easter Holy Week commenced on March 28, 2021. On February 5, 2021, the Supreme Court issued *South Bay United Pentecostal Church, et al. v. Newsom, et al.*, 141 S. Ct. 716 (2021), which enjoined the State of California from enforcing the Blueprint for a Safer Economy's Tier 1 prohibition on indoor worship services against South Bay. The Court nevertheless denied South Bay's request for injunctive relief with respect to the percentage capacity limitations across all tiers of the Blueprint, and specifically stated that the State was not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. The Court invited South Bay to present further evidence to the district court that the State's 25% and 50% capacity restrictions on indoor worship services were underinclusive and thus violated the Free Exercise Clause.

South Bay moved for a temporary restraining order ("TRO") on an emergency basis on March 11, 2021, more than a month after the State's February 6, implementation of revised restrictions on indoor worship. In accordance with South Bay's request, the district court set the TRO hearing for March 24, before Palm Sunday. But South Bay requested an extension of time for the briefing and hearing schedule so that it could file a reply. To accommodate this request, the district court reset the hearing date for March 29. Although the Supreme Court had permitted South Bay to present new evidence to show that the percentage capacity limitations

were not generally applicable, South Bay failed to do so until it filed the TRO reply papers.

At the March 29, 2021 TRO hearing, the district court considered both parties' submitted declarations addressing the application of the percentage caps. The State contended that the percentage caps were applied in a way that favored places of worship. South Bay, on the other hand, averred that the State's arguments constituted an impermissible post hoc rationalization. Both parties represented that additional evidence was forthcoming. The district court was unable to make findings on an adequate record and thus exercised its discretion to further continue the hearing to develop the record for meaningful review. The panel held that this was not an abuse of discretion, notwithstanding the unfortunate timing. The panel thus could not conclude that the district court committed clear error as a matter of law, and accordingly, denied without prejudice, South Bay's petition for this extraordinary relief.

COUNSEL

Charles S. LiMandri, Paul M. Jonna, and Jeffrey M. Trissell, LiMandri & Jonna, LLP, Rancho Santa Fe, California; Thomas Brejcha, Peter Breen, and Christopher A. Ferrara, Thomas More Society, Chicago, Illinois; Harmeet K. Dhillon and Mark P. Meuser, Dhillon Law Group Inc., San Francisco, California; for Petitioners.

Todd Grabarsky, Lisa J. Plank, and Anna Ferrari, Deputy Attorneys General, Paul Stein, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Matthew Rodriquez, Acting Attorney General; Office of the Attorney General of California, Los Angeles,

California; for Real Parties in Interest Governor Gavin Newsom, Acting Attorney General, Matthew Rodriquez, and Public Health Officer, Dr. Tomás Aragón.

Timothy M. White and Jeffrey P. Michalowski, Senior Deputies, Office of County Counsel, San Diego, California; for Real Parties in Interest Dr. Wilma J. Wooten, Helen Robbins-Meyer, and William D. Gore.

Richard B. Katskee, Alex J. Luchenitser, and Adrianne M. Spoto, Americans United for Separation of Church and State, Washington, D.C., for Amici Curiae Americans United for Separation of Church and State; Central Conference of American Rabbis; Covenant Network of Presbyterians; Disciples Center for Public Witness; Disciples Justice Action Network; Equal Partners in Faith; Interfaith Alliance Foundation; Men of Reform Judaism; Methodist Federation for Social Action; National Council of the Churches of Christ in the USA; Reconstructionist Rabbinical Association; Southwest Conference of the United Church of Christ; Union for Reform Judaism; and Women of Reform Judaism.

ORDER

On March 30, 2021, South Bay United Pentecostal Church and Bishop Arthur Hodges III (collectively, "South Bay") filed an Urgent Petition for Writ of Mandamus under Circuit Rule 27-3(b) (ECF No. 1). That same day, we ordered an answer from the State of California (the "State") (ECF No. 2). For the following reasons, we deny the petition without prejudice.

On February 5, 2021, the Supreme Court issued *South Bay United Pentecostal Church, et al. v. Newsom, et al.*, 141 S. Ct. 716 (2021) ("*South Bay II*"). The Court enjoined the State of California from "enforcing the Blueprint's [for a Safer Economy] Tier 1 prohibition on indoor worship services" against South Bay. *Id.* at 716. The Court denied South Bay's request for injunctive relief "with respect to the percentage capacity limitations,"[1] and specifically stated that the State was "not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1." *Id.* at 716. The Court further explained that its "order is without prejudice to the *applicants* presenting new evidence to the District Court that the State is not applying the percentage capacity limitations . . . in a generally applicable manner."[2] *Id.* (emphasis added). In other words, the Court invited South Bay to present further evidence to the district court that the State's 25% and 50% capacity restrictions on indoor worship services are underinclusive because the same restrictions do not apply to secular activities that pose similar dangers of spreading COVID-19, and thus violate the Free Exercise Clause.

The following day, February 6, the State revised the Blueprint to allow indoor worship at 25% capacity in Tier 1 and removed the numerical caps in Tiers 2 and 3 (the latter of which we had previously ordered). The State retained the 25% capacity limit in Tier 2 and the 50% capacity limit in

[1] South Bay's emergency application in the Supreme Court had also requested that the percentage capacity limitations across all tiers of the Blueprint be enjoined. The Supreme Court declined to do so. *See South Bay II*, 141 S. Ct. at 716.

[2] South Bay's urgent petition concedes that the Court's reference to "percentage capacity limitations" is to Tiers 2 through 4, as Tier 1 prohibited indoor worship entirely and imposed no capacity limitation.

Tiers 3 and 4. The State also loosened its ban on singing and chanting during worship services by permitting performers (but not congregants in the audience) to engage in singing, chanting, and similar vocalizations, subject to face-coverings, enhanced distancing, and other precautions.[3]

Although it has long been known that Easter Sunday would be on April 4, 2021, with Palm Sunday falling on the prior Sunday, March 28, South Bay waited until March 11, more than a month after the State's February 6 implementation of the revised restrictions, to move for a temporary restraining order ("TRO") on an emergency basis in the district court. It sought an injunction against enforcement of the 25% capacity restriction before Holy Week commenced on March 28.[4] South Bay submitted no new evidence with its motion.[5] In accordance with South Bay's request, the district court set the TRO hearing for March 24, before Palm Sunday. But South Bay requested an extension of time for the briefing and hearing schedule so that it could file a reply. To accommodate this request, the district court reset the hearing date for March 29.

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[3] Heeding concerns expressed by members of the *South Bay II* Court, the State also clarified that performers in the entertainment industry are prohibited from singing before a live audience.

[4] Although it is clear that South Bay seeks to enjoin Tier 2's 25% capacity limitation, it is unclear precisely what relief South Bay seeks. In its petition, South Bay suggests that it should be treated both like nonessential retail (subject to a 50% capacity limitation in Tier 2) and like a grocery store (subject to no capacity restrictions in Tiers 2–4 but required to follow other stringent social distancing requirements).

[5] In response to the State's expert declaration addressing occupancy rates and how they affect percentage of capacity limitations, South Bay submitted new declarations of its own for the first time on reply.

At the TRO hearing, the district court determined that an evidentiary hearing was necessary before it could properly grant injunctive relief. The new evidence presented by both sides joined at least two questions: (1) Whether due to occupancy loads, notwithstanding the lower percentage caps for worship services as compared to certain secular activities, houses of worship were in actuality treated more favorably than those activities; and (2) whether the State took occupancy loads into consideration when determining the least restrictive means or whether this argument is a post hoc rationalization. The district court noted the understandable frustration of some members of the Court with the lack of a meaningful record, *see*, *e.g.*, *South Bay* II, 141 S. Ct. at 717 (Barrett, J., concurring), so it determined that it could not grant immediate injunctive relief without holding an evidentiary hearing. After initially scheduling the hearing for April 7, the court pushed it back to accommodate South Bay's discovery requests. South Bay then filed this urgent petition with our court, contending that the district court erred by denying the TRO pending an evidentiary hearing.

"Mandamus 'is a drastic and extraordinary remedy reserved for really extraordinary causes.'" *In re Bundy*, 840 F.3d 1034, 1040 (9th Cir. 2016) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted)). "[O]nly exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of" the remedy. *Cheney*, 542 U.S. at 380. Because "the writ is one of 'the most potent weapons in the judicial arsenal,'" *Bundy*, 840 F.3d at 1040 (quoting *Cheney*, 542 U.S. at 380), we consider five factors to determine whether relief is appropriate:

> (1) whether the petitioner has other adequate means, such as direct appeal, to attain the relief he or she desires; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order makes an "oft-repeated error," or "manifests a persistent disregard of the federal rules"; and (5) whether the district court's order raises new an important problems, or legal issues first impression.

In re Van Dusen, 654 F.3d 838, 841 (9th Cir. 2011) (citing *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977)). "[T]he absence of factor three—clear error as a matter of law—will always defeat a petition for mandamus." *Bundy*, 840 F.3d at 1941 (quoting *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015)).

We cannot conclude that the district court committed clear error as a matter of law. The Supreme Court permitted South Bay to present new evidence to show that the percentage capacity limitations are not generally applicable, but South Bay failed to do so until it filed its TRO reply papers. At the hearing, the district court considered both parties' submitted declarations addressing the application of the percentage caps. The State contended that the percentage caps are applied in a way that favors places of worship. South Bay, on the other hand, averred that the State's arguments constituted an impermissible post hoc rationalization. Both parties represented that additional evidence is forthcoming. The district court was unable to make findings on an adequate record and thus exercised its discretion to continue the hearing to develop the record for

meaningful review. This was not an abuse of discretion, notwithstanding the unfortunate timing.

Accordingly, we **DENY** without prejudice South Bay's petition for this extraordinary relief.

IT IS SO ORDERED.