SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 397 (Jones)
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Hearing Date: April 13, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Emergency powers: essential services: religious services

DIGEST

This bill would amend the California Emergency Services Act to require that, during a state of emergency, the Governor must declare religious services to be "essential services," and to curtail the Governor's discretion in issuing emergency orders relating to religious-based meetings, organizations, and educational institutions.

EXECUTIVE SUMMARY

Under current law, the executive branch of the state government and certain local governing bodies are empowered to declare a state of emergency and take a number of actions to suspend or modify certain regulations and statutes during that emergency so as to promote public health and safety. This bill would limit those powers by requiring that, during a state of emergency, the Governor or local entity declare a wide range of religion-based activities to be "essential services," thereby permitting them to function at the same level as businesses and services declared essential, and by prohibiting the enforcement of content-neutral emergency orders that substantially burden religious services as to those religious services unless there is no less restrictive means of accomplishing the purpose of the order. This analysis has been revised to reflect the United States Supreme Court's order in *Tandon v. Newsom* (Apr. 9, 2021) 539 U.S. __, Case No. 20A151, which was issued after the analysis was initially released.

This bill is sponsored by the California Family Council, Capitol Resource Institute,, Judeo-Christian Caucus, and Real Impact, and it is supported by a number of faith-based organizations and 7,002 individuals. The bill is opposed by American Atheists and the Health Officers Association of California. Should this bill pass this Committee, it will then be referred to the Senate Committee on Governmental Organization.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the California Emergency Services Act, the purpose of which is to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to life, property, and the resources of the state, and to protect the health and safety and preserve the lives and property of the people of the state. (Gov. Code, tit. 2, div. 1, ch. 7, §§ 8550 et seq.)

2) Defines "state of emergency" as the duly proclaimed existence of conditions of disaster or extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission. (Gov. Code, § 8558(b).)

3) Empowers the Governor to proclaim a state of emergency in an area affected or likely to be affected when:
   a) The Governor finds that the circumstances described within the definition of "state of emergency" exist;
   b) The Governor is requested to do so by the appropriate local executive(s); or
   c) The Governor finds that local authority is inadequate to cope with the emergency. (Gov. Code, § 8625.)

4) Authorizes the Governor, in a state of emergency, to suspend any regulatory statute or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency. (Gov. Code, § 8571.)

5) Authorizes the Governor, in a state of emergency, to make, amend, and rescind orders and regulations necessary to carry out the California Emergency Services Act, with due consideration given to the plans of the federal government in preparing the orders and regulations. Orders and regulations, or amendments or rescissions thereof, issued during a state of emergency must be in writing and take effect immediately upon their issuance; when the state of emergency is terminated, the orders and regulations have no further effect. (Gov. Code, § 8567.)

6) Grants the Governor, in a state of emergency, to the extent the Governor deems necessary, complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations deemed necessary in accordance with the provisions listed above in Part 5). (Gov. Code, § 8627.)

7) Authorizes the Governor, in a state of emergency, to make, amend, or rescind orders and regulations that may temporarily suspend any state, county, city, or special district statute, ordinance, regulation, or rule imposing nonsafety-related restrictions on the delivery of food products, pharmaceuticals, and other emergency necessities distributed through retail or institutional channels, with the requirement that the Governor provide widespread publicity and notice of such orders, amendments, or rescissions. (Gov. Code, § 8627.5.)

8) Authorizes a local governing body to declare a local emergency, to be reviewed every 60 days until terminated. The local governing body, during a local emergency, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety. Such orders and regulations and amendments and rescissions thereof shall be in writing and shall be given widespread publicity and notice. (Gov. Code, §§ 8630, 8634.)

9) Provides that the state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of the California Emergency Services Act. (Gov. Code, § 8655.)

10) Requires the State Department of Health Services (the Department) to maintain a list of reportable diseases and conditions and a list of communicable diseases and conditions (Health & Saf. Code, § 120130(a) & (b)), and authorizes the Department to take a range of actions with respect to certain diseases, including:
    a) Adopting and enforcing regulations requiring strict or modified isolation, or quarantine, for any of the contagious, infectious, or communicable diseases, if in the opinion of the Department the action is necessary for the protection of the public health. (Health & Saf. Code, § 120130(c).)
    b) Requiring strict or modified isolation or quarantine for any case of contagious, infectious, or communicable disease, when this action is necessary for the protection of the public health. (Health & Saf. Code, § 120130(d).)
    c) Establish and maintain places of quarantine or isolation. (Health & Saf. Code, § 120135.)

d) Upon being informed by a health officer of any contagious, infectious, or communicable disease, take measures necessary to ascertain the nature of the disease and prevent its spread, including, if the Department deems proper, taking possession or control of the body of any living person or corpse of any deceased person. (Health & Saf. Code, § 120140.)
e) Quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in the judgment of the Department the action is necessary to protect or preserve the public health. (Health & Saf. Code, § 120145.)
f) Advise all local health authorities and, when in its judgment the public health is menaced, control and regulate their action. (Health & Saf. Code, § 131080.)

This bill:

1) Establishes the Religion Is Essential Act (the Act).

2) Defines "discriminatory action" as any of the following actions taken against an organization on the basis of that organization being a religious organization:
   a) Altering the organization's tax treatment, causing any tax, penalty, or payment to be assessed against the organization, or revoking the organization's tax exemptions;
   b) Disallowing, denying, or otherwise making available the organization's state tax charitable contribution deductions;
   c) Imposing, levying, or assessing a monetary fine, fee, civil or criminal penalty, damages award, or injunction against the organization; and
   d) Withholding, reducing, excluding, terminating, or materially altering the organization's state grants, contracts, subcontracts, guarantees, loans, scholarships, entitlements or benefits, licenses, certifications, accreditation, recognition, or other similar benefits.

3) Defines "religious organization" to mean any of the following:
   a) A house of worship, including but not limited to churches, synagogues, shrines, mosques, and temples;
   b) A religious group, corporation, association, educational institution, ministry, order, society, or similar entity, regardless of whether it is integrated or affiliated with a house of worship; and
   c) An officer, owner, employee, manager, religious leader, clergymember, or minister of an entity or organization described above in a) and b).

4) Defines "religious services" to mean a meeting, gathering, or assembly of two or more persons organized by a religious organization for the purpose of worship, teaching, training, providing educational services, conducting religious rituals, or other activities that are deemed necessary by the religious organization for the exercise of that religion.

5) Defines "state and local governments" to include any of the following:
    a) The state or a political subdivision of the state;
    b) An agency of the state or of a political subdivision of the state, including a department, bureau, board, commission, council, court, or public institution of higher education;
    c) A person acting under color of state law;
    d) A private person suing under or attempting to enforce a law, rule, or regulation adopted by the state or a political subdivision of the state.

6) Provides that, during a state of emergency, the Governor shall deem religious services to be an essential service and to be necessary and vital to the health and welfare of the public; and that, during a local emergency, the local governing body shall deem religious services to be an essential service and to be necessary and vital to the health and welfare of the public.

7) Provides that, during a state of emergency or local emergency, state and local governments shall not take a discriminatory action against a religious organization and shall permit a religious organization to continue operating and engaging in religious services to the same or greater extent that other organizations or businesses that provide essential services that are necessary and vital to the health and welfare of the public are permitted to operate.

8) Provides that, during a state of emergency or local emergency, state and local governments shall not enforce any health, safety, or occupancy requirement that imposes a substantial burden on a religious service unless the state or local government demonstrates that applying the burden to the religious service is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling government interest.

9) Provides that, except as provided in Part 8) above, the bill does not prevent state and local governments from requiring religious organizations from complying with health, safety, and occupancy requirements issued by the state or federal government that are applicable to all organizations and businesses that provide essential services.

10) Creates a cause of action for violation of the Act by a religious organization against a state or local government in a judicial or administrative proceeding, and permits a religious organization to use an alleged violation of the Act as a defense in such a proceeding, without regard to whether the proceeding is brought by or in the name of the state, a private person, or any other party.

11) Provides that a religious organization may assert a claim for a violation of the Act no later than two years after it knew or should have known of the violation.

12) Provides that, when a religious organization successfully asserts a claim or defense under the Act, the religious organization may be entitled to any of the following:
    a) Declaratory relief;
    b) Injunctive relief;
    c) Compensatory damages for pecuniary and nonpecuniary losses;
    d) Reasonable attorney fees and costs; and
    e) Any other appropriate relief.

13) Provides that all claims for money damages for violations of the Act shall be governed by Division 3.6 of Title 1 of the Government Code (Gov. Code, §§ 810 et seq.).

14) Provides that the Act shall be construed in favor of a broad protection of the free exercise of religion; that the protections provided by the Act are in addition to existing legal protections; that, in case of conflicts with other laws, the Act supersedes any state law that impinges on the free exercise of religion protected by the Act unless the conflicting statute expressly exempts itself from compliance; and that, if any provision of the Act is held to be invalid, the remainder of the Act shall not be affected.

15) Provides that the Governor's authority to take action during a state of emergency, set forth in Government Code sections 8571, 8627, 8627.5, 8634, and 8655 (Parts 4) and 6)-9) in the "existing law" section), are limited by the provisions of the Act.

16) Provides that the Department's authority to adopt and enforce regulations related to, or impose, an isolation or quarantine for communicable or contagious diseases, and to seize persons or property in connection with an isolation or quarantine, and to control local health authorities as needed, as set forth in Health and Safety Code sections 120130, 120135, 120140, 120145, and 13100 (Part 10) in the "existing law" section) is limited by the provisions of the Act.

COMMENTS

1. Author's comment

According to the author:

> The First Amendment to the US Constitution guarantees Americans religious freedom, including the right to congregate with fellow members at their chosen house of worship. For 11 months, California Governor Newsom used the excuse of COVID to violate those rights. While the state found a way to safely open "big box" stores, resume filming in Hollywood, and allow personal care experiences, you still could not attend an indoor religious service. The state assumed a store manager could keep shoppers safe, but did not trust pastors and other faith leaders to keep their congregations safe.

SB 397 deems religious services to be essential services. This bill also prohibits government from taking discriminatory action against a religious organization by requiring religious services to be allowed, at the very least, to the same extent other essential services are permitted to operate. Furthermore, SB 397 requires any burden placed on religious organizations by the government to be the least restrictive means in order to further the compelling government interest of public health and safety.

This bill ensures that religious organizations are treated fairly and allowed to operate under only the same restrictions of other essential services, while still allowing room for government to set safety parameters in the interest of public health needs.

Our religious communities have been made second-class citizens and have been disallowed to feed their souls. As this crisis enters its second year – and hovers over a second Easter, a second Passover, and a second Ramadan – we must ensure protection of California's churches, synagogues, temples, and mosques against another forced closure.

2. This bill will limit the executive's ability to impose safety-related measures in the next emergency

The COVID-19 pandemic is unprecedented in many ways, and one of its most distinguishing (and exhausting) features is how long it has lasted. Governor Newsom declared a COVID-19 state of emergency on March 4, 2020,[1] and issued a statewide stay-at-home order on March 19, 2020.[2] Over a year later, the pandemic and the state of emergency are still in effect—though thankfully, as millions more Americans are vaccinated each day, we seem to be near the end.

As the science on COVID-19 shifted, so too did the public health response; emergency orders that seemed reasonable one day might have seemed woefully backwards the next. In a case declining to impose a preliminary injunction on certain of California's emergency orders, Chief Justice Roberts recognized the importance of not second-guessing executive branch officials in the early stages of an emergency while they are "actively shaping their response to changing facts on the ground."[3] This bill, however,

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[1] Office of Governor Gavin Newsom, *Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19* (Mar. 4, 2020), available at: https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/ [last visited Apr. 9, 2021].

[2] Executive Department, State of California, Executive Order No. N-33-20 (Mar. 19, 2020), *available at* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf [last visited Apr. 9, 2021].

[3] *South Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613, 1614 (conc. opn. of Roberts, C.J.); *see also South Bay United Pentecostal Church v. Newsom* (2021) 141 S.Ct. 716, 716-717 (conc. opn. of Roberts, C.J.) ("As I explained the last time the Court considered this evolving case, federal courts owe significant

relies significantly on facts specific to this emergency to justify putting limitations on all future emergencies, even though the science developed over time relating to COVID-19 might not be relevant to whatever the next emergencies may be.

The declaration of Dr. Timothy P. Flanigan, discussed in Section 2 of the bill, illustrates how our understanding of an emergency can change over time, and why courts are generally reluctant to apply hindsight to determine whether an emergency action was unduly burdensome. Dr. Flanigan's declaration was offered in support of a church challenging a Nevada emergency order.[4] The declaration compares guidelines drafted by the United States Center for Disease Control and Prevention (CDC) available on the CDC website on June 4, 2020, with a CDC case study involving a COVID-19 outbreak at an Arkansas church in March 2020, in which a single couple infected with COVID-19 attended church events and, of 92 people who attended those events over a period of five days, 35 people contracted COVID-19 and three passed away.[5] The transmission event was contemporaneously publicized in the national press, with the pastor of the church urging his Facebook followers to follow public health experts' recommendation to stay home.[6] The declaration suggests that, had the church followed the CDC guidelines available in June, the Arkansas outbreak would not have occurred.[7]

Yet as Dr. Flanigan acknowledges, the CDC guidelines he reviewed did not exist when the Arkansas outbreak occurred.[8] The CDC's interim guidelines for community- and faith-based organizations in effect from March 6 to March 11 of 2020, the span of the Arkansas outbreak, look nothing like the guidelines that were propounded later in the pandemic when health experts had more information. The early March CDC guidelines make no mention of social distancing or masks—indeed, at the time, the CDC *discouraged* wearing masks[9]—and make suggestions as mild as having hand sanitizer available for congregants, planning for staff outages, and implementing a "buddy system" to ensure hard-to-reach community members receive COVID-19 updates.[10]

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deference to politically accountable officials with the 'background, competence, and expertise to assess public health.' ").

[4] Expert Declaration of Dr. Timothy P. Flanigan, filed in support of Plaintiff's Motion for Preliminary Injunction, *Calvary Chapel Dayton Valley v. Sisolak*, No. 3:20-cv-00303, Dkt. 38-31 (D. Nev. June 3, 2020.

[5] CDC, *High COVID-19 Attack Rate Amont Attended at Events at a Church – Arkansas, March 2020* (May 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm [last visited Apr, 9, 2021].

[6] *Eg.*, Zaumer, *'Take it very seriously': Pastor at Arkansas church were 34 people came down with coronavirus sends a warning*, Washington Post (Mar. 24, 2020), *available at* https://www.washingtonpost.com/religion/2020/03/24/pastor-arkansas-church-coronavirus-warning-greers-ferry/ [last visited Mar. 25, 2021].

[7] *Id.*, ¶¶ 28-32.

[8] *Id.* at ¶ 29.

[9] [9] *See* Dwyer & Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public*, NPR (Apr. 3, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public [last visited Apr. 9, 2021].

[10] CDC, Interim Guidance, *Get Your Community- and Faith-Based Organizations Ready for Coronavirus Disease 2019* (Mar. 6, 2020), *available at*

After the Arkansas outbreak, and a rapid increase in infection rates that made clear how dangerous the COVID-19 virus could be, the CDC updated its guidance for community- and faith-based organizations; in the updated guidance, released March 21, 2020, the tone was significantly more urgent.[11] The CDC's March 21, 2020, recommendations included suggesting that religious leaders incorporate social distancing measures, consider canceling events with ten people or more, providing high-risk populations with methods to attend services remotely, and suspending the rite of Communion to prevent transmission of the virus.[12] Despite the updated CDC guidance, a second widely publicized outbreak occurred at a church choir rehearsal at the end of March 2020: of 60 attendants, 28 tested positive for coronavirus and two died.[13]

None of this is to say that Dr. Flanigan is incorrect to opine that transmission during the COVID-19 pandemic could be safely curbed if religious services complied with the CDC's interim guidelines that were in place at the time he gave his opinion, which were propounded on May 23, 2020.[14] The point is, even assuming he is correct—that, by May of 2020, the CDC had adequate knowledge to propound guidelines that would allow religious services to continue safely indoors under limited circumstances—this does not support the bill's premise that the governor's emergency powers should be curtailed in every state of emergency going forward, especially at the very beginning of an emergency. The CDC's drastically shifting guidance over the course of just a few months illustrates why emergency powers are as broad as they are: in the initial fog of an emergency, health officials and executives are unlikely to have the luxury of complete information and have to do the best with what they have.

This bill would remove the executive branch's flexibility to respond to a state of an emergency, regardless of the state of the science, as long as they are related to a religious institution. The bill requires that, in a state of emergency, "religious services" be deemed essential and be given the same permission to operate as any other secular institution deemed essential—if not even greater permissions. The bill does not provide space for determinations based on the differences between different types of activities, e.g., the fact that some essential businesses might involve persons indoors but walking around, while some religious services might involve staying stationary. The bill is, therefore, essentially a mandate that, whatever secular institution is given the greatest

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https://web.archive.org/web/20200306210010/https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html [last visited Apr. 9, 2021].

[11] CDC, *Interim Guidance for Administrators and Leaders of Community- and Faith-Based Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)* (Mar. 21, 2020), *available at* https://stacks.cdc.gov/view/cdc/86214 [last visited Apr. 9, 2021].

[12] *Ibid.*

[13] Sorace, *Washington choir rehearsal linked to coronavirus outbreak after dozens of members fall ill, 2 die*, Fox News (Mar. 31, 2020) https://www.foxnews.com/us/washington-choir-rehearsal-coronavirus-outbreak [last visited Apr. 9, 2021].

[14] *See* CDC, *Interim Guidance for Communities of Faith* (May 23, 2020), *available at* http://metrolifechurch.com/wp-content/uploads/sites/14/2020/06/Interim-Guidance-for-Communities-of-Faith-_-CDC.pdf [last visited Apr. 9. 2021].

leeway to operate during a state of emergency, the same leeway be given to religious services—no matter how different the secular essential services are, and no matter what the scientific consensus is about how the risks might vary between them.

Additionally, because the bill's religion-based definitions are so broad, the number of religiously oriented activities that must be deemed "essential" would require a significant amount of activity to continue despite scientific evidence that such activities are dangerous. The bill defines "religious organization" to include not only houses of worship but also religious educational institutions, religious societies, and religious corporations; it also defines "religious services" to include not only worship services but also gatherings for the purpose of providing teaching, providing educational services, and any other activity that the religious organization deems necessary. This bill thus envisions a situation where, e.g., if a pharmacy is allowed to be open, so too must a religious elementary school.

Finally, this bill relies on the implicit assumption that, because people like Dr. Flanigan concluded that there is no insurmountable risk in allowing religious services to proceed during this pandemic, that will hold true for all future states of emergency. While the next state of emergency might be in response to a similar respiratory virus pandemic, it might not—making all assumptions about what can be safely done under COVID-19 irrelevant. Curtailing the executive branch's emergency powers in all emergencies based on the facts of this emergency could lead to unnecessary public harm.

3. <u>The bill's broad definitions would require more favorable treatment for some religious organizations than for comparable secular institutions</u>[15]

States remain free to impose neutral, generally applicable laws that happen to also curtail religious activities, as long as the regulated entities are comparable to the religious activities.[16] States, for example, remain free to impose emergency occupancy or mask limitations on *all* essential services.[17] This bill, however, would circumvent that longstanding state power and require the executive to give preferential treatment to certain religious activities.

As noted above, the bill's definition of "religious organizations" and "religious services" include not only worship services, but also educational institutions and corporations performing teaching and any other activity the organization deems

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[15] The version if this analysis released on April 9, 2021, discussed the United States Court of Appeals for the Ninth Circuit's order in *Tandon v. Newsom* (9th Cir., Mar. 30, 2021) ___ F.3d ___, Case No. 21-15228. The United States Supreme Court reversed that order on April 9, 2021. (*See Tandon v. Newsom* (Apr. 9, 2021) 593 U.S. ___, Case No. 20A151.)

[16] *See Employment Div. v. Smith* (1990) 494 U.S. 872, 880; *City of Boerne v. Flores* (1997) 521 U.S. 507, 535-536; *Tandon v. Newsom* (Apr. 9, 2021) 593 U.S. ___, Case No. 20A151; *see also South Bay United Pentecostal Church v. Newsom* (2021) 141 S.Ct. 716, 717 (conc. opn. of Barrett, J.) (denying application for injunction in part because the record did not establish whether a particular emergency order was a neutral and generally applicable law or favored certain sectors at the expense of religious activities).

[17] *See Tandon v. Newsom* (Apr. 9, 2021) 593 U.S. ___, Case No. 20A151.

essential. And because this bill requires all defined "religious services" to be allowed to operate under the same terms as every other essential services—no matter how disparate— this bill would effectively give preferential treatment to religious services as compared to comparable secular services, which might violate the Establishment Clause of the First Amendment.[18]

The most conspicuous example of this application of the bill arises with respect to schools. Because the bill includes "educational instutition[s]" within the meaning of "religious organization" and "teaching…[and] providing educational services" within the meaning of "religious services," it appears that the bill would require all schools associated with a religious faith to be given whatever treatment was given to "essential services," not whatever treatment has been determined to be safe for schools. Not only could this give rise to an Establishment Clause violation, but it seems likely to pose a significant health risk, not just to the children who would be going to school despite medical advice to the contrary, but to anyone else those children come in contact with.

4. <u>This bill would make the courts the ultimate arbiter of emergency health and safety restrictions, even where not specifically targeted at religious services</u>

This bill imposes a second, more conspicuous limitation on the state's ability to impose emergency health and safety orders. While the bill purports to permit state and local governments to impose health, safety, or occupancy requirements that are applicable to all organizations and businesses that provide essential services, that provision contains an exception that swallows the rule. Specifically, the bill provides that a state or local government may not enforce any health, safety, or occupancy requirement that impose a "substantial burden" on a religious service unless the state or local government demonstrates that applying the burden to the religious service is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

By requiring all measures "substantially burdening" religious services—even those applied to all essential services—to be the least restrictive means of achieving a safety goal, this bill would render every general safety order open to second-guessing by the courts. In such proceedings, public safety decisions that had to be made in the spur of the moment would be picked apart by judges and parties, and subjected to after-the-fact speculation about possible alternatives by persons who have no duty to take the entire state's wellbeing into account. The likelihood of second-guessing and uncertainty is compounded by the "substantial burden" qualifier, which is undefined and might vary from organization to organization. This provision thus provides little help to state and local executives looking for guidance on how to avoid running afoul of the bill.

[18] *E.g.*, *McCreary County v. ACLU* (2005) 545 U.S. 844, 860 ("the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion' ").

Moreover, because the "least restrictive means" provision is a carve-out to the provision permitting health and safety measures applicable to all essential businesses, this provision would significantly hamper the executive's ability to impose general health and safety rules in an emergency. Any health or safety measure directed at essential activities that happened to include religious services could be challenged and struck down as to those religious activities unless there were no less restrictive ways to accomplish the goal. As discussed above, states are permitted to enact general laws of neutral applicability during normal times; to constrain this authority when the state's police power is otherwise at its apogee is contrary to prior precedent regarding state power during an emergency.[19]

Two other provisions of the bill increase the likelihood of extensive, and costly, litigation relating to the proper scope of emergency orders that touch on religious services. First, the bill permits a religious organization suing under the bill to seek damages and attorney fees and costs, in addition to declaratory or injunctive relief terminating the bill. Second, the bill permits lawsuits challenging an emergency order and seeking damages for up to two years after the religious organization "knew or should have known" that an emergency order violated the Act. Put together, these provisions permit actions for damages long after an emergency is over, from conceivably hundreds if not thousands of California-based religious organizations.[20]

5. Arguments in support

According to bill co-sponsor California Family Council:

> When Governor Gavin Newson used his state of emergency powers last March to issue a stay-at-home order, he also published a list of exempted "essential" businesses and services that would be allowed to operate inside their facilities with modifications. In violation of the First Amendment prohibition on "prohibiting the free exercise" of religion, the Governor excluded churches and religious organizations from the "essential" list. Instead, they were placed in the

[19] *See, e.g.*, *South Bay United Pentecostal Church v. Newsom*, *supra*, 140 S.Ct. at pp. 1613-1614 (conc. opn. of Roberts, C.J.) (when politically accountable "officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' [Citation.] Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.").

[20] It's conceivable that, after one religious organization prevailed in a lawsuit, subsequent religious organizations could employ nonmutual offensive collateral estoppel to prevent the litigation of whether a particular emergency order was not the least restrictive means available. (*See Transport Insurance Co. v. Superior Court* (2016) 222 Cal.App.4th 1216, 1224 [listing elements of nonmutual offensive collateral estoppel].) While courts have frequently applied a "public interest exception" to avoid application of collateral estoppel against state entities (*e.g.*, *City of Sacramento v. State of California* (1990) 50 Cal.3d 1, 64-65), it is difficult to say where the public interest would lie here. On the one hand, application of nonmutual offensive collateral estoppel would result in a virtually automatic damages award for every religious organization that filed suit; on the other, requiring each organization to litigate from square one would increase the attorney fees and costs ultimately awarded to the organization.

> same category as movie theaters and gyms, and not allowed to gather inside their places of worship while in the state's purple tier. This treated churches worse than other industries the state allowed to stay open including TV, music, and film production studios; airports; bus and train stations; and salons, malls, and other retail stores…
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> The Religion is Essential Act simply seeks to codify into state law what the Supreme Court has repeatedly upheld, the First Amendment protects churches from being treated worse than comparable secular businesses. We acknowledge that public officials have the authority to protect public health and safety, and the Act allows them to do so, but they must have very strict and compelling reasons to suspend rights protected by the First Amendment. At a minimum, state law should require the government to treat religious organizations at least as well as comparable secular organizations.

According to bill supporter Pacific Justice Institute – Center for Public Policy:

> California courts have previously cautioned that the extraordinary powers arising under the Emergency Services Act (ESA) must still be exercised "consistent with individual rights and liberties." *Macias v. State*, 10 Cal.4th 844, 854 (1995). This caution has not been heeded during the past year. It is therefore incumbent on the Legislature to remove all doubt that closing houses of worship will rarely if ever be consistent with the Governor's lawful powers.
>
> SB 397 is a modest step toward fundamental rights of religious freedom. If anything, we believe it could benefit from amendments to strengthen its protections. The closure of houses of worship poses a serious conflict with not only the Free Exercise Clause but also the Establishment Clause of the First Amendment. Strong arguments weigh in favor of making worship categorically exempt from the ESA. This would be consistent with the ESA's existing protections of other First Amendment freedoms for the press, and specific protection of the Second Amendment during times of emergency. Cal. Govt. Code Sections 8571.5 and 8572.

6. <u>Arguments in opposition</u>

According to bill opponent Health Officers Association of California:

> California law recognizes the importance of protecting public health by empowering and requiring local health officers to take actions as necessary to prevent the spread of disease. The local health officer is a physician appointed by and accountable to the local elected body (either a County Board of Supervisors or a City Council). Health officer orders are subject to due process and may be challenged in court. Health officers must operate in a manner consistent with the U.S. and the California constitutions. In addition, case law in the United States

has shown that health officer orders should be narrowly tailored and the least restrictive reasonable means of preventing disease. All of these factors create a balance that protects the public's health while ensuring appropriate constitutional protections. This bill seeks to change this balance in a way that could harm the people of our state.

SUPPORT

California Family Council (co-sponsor)
Capitol Resource Institute (co-sponsor)
Judeo-Christian Caucus (co-sponsor)
Real Impact (co-sponsor)
7,002 individuals
Calvary Chapel Chino Hills
Christian Home Educators Association of California
Dr. Jay Bhattacharya
Pacific Justice Institute—Center for Public Policy
Right to Life Kern County
The Bridge Bible Fellowship
The Salt & Light Council
Traditional Biblical Values for Next Generations
Valley Christian Church of Chino
Women VIPS

OPPOSITION

American Atheists
Health Officers Association of California

RELATED LEGISLATION

Pending Legislation:

SB 549 (Jones, 2021) provides that, if the Governor opts to designate social workers as "essential workers" in a state of emergency, they shall be included in the top tier of essential workers who are eligible to receive emergency materials, including, but not limited to, personal protective equipment, medicines, and any and all other health and safety equipment and gear necessary to fulfill their critical work. SB 549 is pending before the Senate Human Services Committee.

SB 448 (Melendez, 2021) establishes the Emergency Power Limitation Act, which would restrict emergency orders to those narrowly tailored to serve a public health purpose and permit any person to bring an action to enjoin an emergency order in violation of that restriction; and prohibit any emergency order from infringing on defined "express

constitutional rights" in a "nontrivial manner." SB 448 is pending before the Senate Governmental Organizations Committee.

SB 209 (Dahle, 2021) requires the Governor to proclaim the termination of a state of emergency at the earliest date possible, or after 45 days, unless extended by the Legislature via concurrent resolution. SB 209 is pending before the Senate Governmental Organizations Committee.

AB 1123 (Rodriguez, 2021) requires the Governor to notify the Speaker of the Assembly and President pro Tempore of the Senate of certain emergency actions, and to provide them and the Assembly Committee on Budget, the Senate Committee on Budget and Fiscal Review, the Assembly Committee on Emergency Management, the Senate Committee on Governmental Organizations, and the Joint Legislative Committee on Emergency Management all of the following with certain updates relating to requests from local governments and expenditures made. AB 1123 is pending before the Assembly Emergency Management Committee.

AB 108 (Cunningham, 2021) provides that any regulation or order promulgated under the California Emergency Services Act made 60 or more days after the proclamation of a state of emergency will take effect only upon concurrent resolution by the Legislature. AB 108 is pending before the Assembly Committee on Emergency Management.

AB 69 (Kiley, 2021) requires the Governor to proclaim the termination of a state of emergency at the earliest date possible, or after 60 days, unless extended by the Legislature via concurrent resolution. AB 69 is pending before the Assembly Committee on Emergency Management.

Prior Legislation:

SB 1163 (Nielsen, 2020) would have limited the persons permitted to return a mail-in ballot during or within six months of a proclamation of a state of emergency due to epidemic or other contagious disease. SB 1163 died in the Senate Committee on Elections and Constitutional Amendments.

SB 275 (Pan, Ch. 301, Stats. 2020) authorized the State Department of Health and the Office of Emergency Services to develop a personal protective equipment stockpile and develop guidelines for the procurement thereof to be used during a pandemic, and added requirements for certain health care employers to maintain an inventory of personal protective equipment.

AB 3307 (Eduardo Garcia, 2020) would have authorized the Governor, in the exercise of emergency powers, to provide direct loans and loan guarantees, and to forgive those loans in appropriate circumstances, for purposes of addressing the financial requirements of businesses when retooling, repurposing, and expanding production

and distributing products necessary to prevent shortages of essential goods. AB 3307 died in the Senate Appropriations Committee.

AB 2968 (Rodriguez, Ch. 257, Stats. 2020) required the Office of Emergency Services to, by January 1, 2022, develop best practices for counties developing and updating a county emergency plan.

AB 2643 (Gallagher, 2020) would have limited the persons permitted to return a mail-in ballot during or within six months of a proclamation of a state of emergency due to epidemic or other contagious disease. AB 2643 was held in the Assembly Committee on Elections and Redistricting.

AB 1857 (Chen, 2020) would have required the Governor to submit a copy of any contract executed using moneys authorized for expenditure pursuant to Governor's emergency powers to the Joint Legislative Budget Committee and members of the Senate Committee on Budget and Fiscal Review and the Assembly Committee on Budget within 72 hours of the contract becoming final. AB 1857 died in the Assembly Committee on Governmental Organization.

AB 883 (Dahle, 2017) would have extended the Governor's emergency authority to include providing for the use of aviation coordination. AB 883 died in the Assembly Committee on Governmental Organization.

AB 289 (Gray, Ch. 106, Stats. 2017) required the Office of Emergency Services to update the State Emergency Services Plan on or before January 1, 2019, and every five years thereafter.

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