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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 SAMUEL A. FRYER
YAVNEH ACADEMY *et al.*,

20 Plaintiffs,

21 v.

22 GAVIN NEWSOM *et al.*,

23 Defendants.

No. 2:20-cv-7408 (JAK) (PLAx)

**SUPPLEMENTAL MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Judge: Hon. John A. Kronstadt

1 One day after Plaintiffs moved for a preliminary injunction, the Defendants re-
2 placed the “county monitoring list” described in Plaintiffs’ memorandum of points and
3 authorities with Tier 1 of the state’s new “Blueprint for a Safe Economy” (the “Blue-
4 print Plan”). California Department of Public Health, *Blueprint for a Safer Economy*,
5 <https://perma.cc/J3YV-PDA9> [hereinafter “Blueprint Plan”] (archived from the origi-
6 nal as last updated Sept. 2, 2020). According to the California Department of Public
7 Health, the School Closure Order described in Plaintiffs’ memorandum “remains in ef-
8 fect except that Tier 1 is substituted for the previous County Data Monitoring List
9 (which has equivalent criteria to Tier 1).” *Id.* Put differently, the Blueprint Plan repre-
10 sents a change in terminology, but preserves the same unconstitutional structure de-
11 scribed in Plaintiffs’ memorandum.

12 The now-rescinded county monitoring list was based on each county’s perfor-
13 mance on five metrics related to the spread of the coronavirus that causes COVID-19.
14 *See* Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Pre-
15 liminary Injunction 4 (ECF No. 29-1) (Aug. 27, 2020). A county’s monitoring list sta-
16 tus determined whether certain industries in the county were permitted to reopen.

17 The new Blueprint Plan assigns each county in the state to one of four color-
18 coded risk “tiers,” ranging from purple Tier 1, with the highest level of restrictions, to
19 yellow Tier 4, with the lowest level of restrictions.¹ The tiers are based on the daily
20 numbers of new COVID-19 cases and positive tests in the county. *See* Blueprint Plan.
21 When a county moves to a lower-risk tier, more activity in the county may resume, but
22 a county can only change tiers after it “remain[s] in a tier for at least 3 weeks” and
23 “meet[s] the next tier’s criteria for two consecutive weeks.” *Id.* For example, Los An-
24 geles County—where most of the Plaintiffs are located—was assigned to the purple

25 _____
26 ¹ The tiered risk levels are: (1) widespread (purple), based on more than 7 daily new
27 cases and more than 8% positive tests; (2) substantial (red), based on 4–7 daily new
28 cases and 5–8% positive tests; (3) moderate (orange), based on 1–3.9 daily new cases
and 2–4.9% positive tests; and (4) minimal (yellow), based on less than 1 daily new
case and less than 2% positive tests. *See* Blueprint Plan.

1 Tier 1 on August 31, 2020, so it cannot move into the red Tier 2 until at least Septem-
2 ber 21, 2020, and then only if it satisfies the red-tier risk criteria for two weeks. Addi-
3 tionally, “[a] county can only move forward one tier at a time, even if metrics qualify
4 for a more advanced tier.” *Id.* Thus if today Los Angeles or another purple-tier
5 county’s numbers fell low enough to qualify it for the yellow tier, and remained at that
6 level, it would not be able to reopen as contemplated by the yellow tier guidelines for
7 more than eight weeks—moving to the red tier on September 21, the orange tier on
8 October 12, and finally the yellow tier on November 2.

9 In addition, the state has said it will also require counties to satisfy yet-to-be-
10 defined “health equity” criteria “that demonstrate a county’s ability to address the
11 most impacted communities” before allowing them to advance through the tiers. *Id.*
12 Since the state has not yet defined those criteria, it’s unclear whether religious com-
13 munities will be considered specially impacted, as well as when or if any county will
14 be able to satisfy these criteria.

15 While the state’s terminology has changed, the School Closure Order “remains
16 in effect except that Tier 1” (the purple tier) “is substituted for the previous County
17 Data Monitoring List (which has equivalent criteria to Tier 1).” *Id.* The Blueprint Plan
18 explains that “[s]chools in the Widespread (purple) tier aren’t permitted to reopen for
19 in-person instruction unless they receive a waiver from their local health department
20 for TK-6 grades.” *Id.* In addition, “[s]chools can reopen for in-person instruction once
21 their county has been in the Substantial (red) tier for at least two weeks.” *Id.* This
22 largely reflects the scheme used in the School Closure Order when the county moni-
23 toring list was in effect: a school in a county that was on the monitoring list was
24 barred from opening, but could reopen two weeks after the county came off the list. In
25 addition, daycare and camps are still permitted to operate in person for counties in all
26 tiers, including Tier 1.

27 The new tier system has no substantive effect on the constitutional questions
28 posed by this case. The School Closure Order continues to prohibit most religious

1 schools in the state from opening for in-person education, including the Plaintiff
2 Schools, and burdens Plaintiffs’ desire to practice their religion by doing so. The state
3 also continues to permit congregation of children in daycares and camps in those same
4 areas. The state has simply tweaked the terminology it uses to categorize the counties.
5 And, as with the former monitoring list, the state provided no pre-deprivation notice
6 or hearing before imposing the Blueprint Plan, and offers no post-deprivation process
7 apart from the same ill-defined and inadequate waivers. The state has also offered no
8 explanation of how the new categorizations were created, what factors it weighed,
9 why it changed its approach, and whether alternatives that would be less restrictive to
10 religious and other civil liberties were considered.

11 If anything, the state’s abrupt shift in methodology will have the effect of pro-
12 longing Plaintiffs’ injuries. The requirements that a county remain in its assigned tier
13 for a minimum of three weeks and that it meet the criteria of the next tier for two
14 weeks before moving are more stringent than the prior system that allowed a county to
15 move off the monitoring list once it met certain criteria for three days. As a result,
16 schools in Los Angeles County have no chance of reopening for at least five weeks
17 from August 31, when the county was assigned to the purple tier. This extends the
18 timeline under which LA County schools would have been able to open under the
19 monitoring list—and extends the uncertainty for schools, administrators, students,
20 teachers, and parents.

21 The sudden shift will also harm Saint Joseph School and other similarly situated
22 religious schools in San Diego County. The state removed San Diego County from the
23 monitoring list on August 18,² and Saint Joseph was nearing the 14-day threshold for
24 reopening. Now, the Blueprint Plan has reset the clock, and San Diego County must
25 “be[] in the Substantial (red) tier for at least two weeks” before schools can reopen.

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27 ² Colleen Shalby, *More Counties Removed from California COVID-19 Watchlist*, L.A.
28 TIMES Aug. 24, 2020, <https://www.latimes.com/california/story/2020-08-24/more-counties-removed-california-covid-19-watchlist>.

1 California Department of Public Health, *Blueprint for A Safer Economy: Understand*
2 *the Status of Your County*, <https://perma.cc/QN7Y-E4EF> (archived from the original as
3 last updated Sept. 4, 2020).

4 Thus, the new Blueprint Plan has made many schools worse off than they were
5 before. Each day the unconstitutional order is applied against the schools causes irrep-
6 arable harm, and the Blueprint Plan simply prolongs that harm.

7 **CONCLUSION**

8 For the foregoing reasons, Plaintiffs request that the Court enter a preliminary
9 and permanent injunction prohibiting the enforcement of the Order against Plaintiffs
10 or any other similarly situated individual or entity.

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1 Dated: September 10, 2020

Respectfully submitted,

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