No. 20-56357

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEST ROCK CHURCH, INC.; HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California,

Plaintiffs–Appellants

v.

GAVIN NEWSOM,
in his official capacity as Governor of the State of California,

Defendant–Appellee

On Appeal from the United States District Court
for the Central District of California (Los Angeles)
In Case No. 2:20-cv-06414-JCB-KK before the Honorable Jesus G. Bernal

CIRCUIT RULE 3-3 PRELIMINARY INJUNCTION APPEAL

PLAINTIFFS–APPELLANTS' REPLY BRIEF

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Nicolai Cocis
Law Office of Nicolai Cocis
25026 Las Brisas Road
Murrieta, CA 95262
(951) 695-1400
nic@cocislaw.com

Attorneys for Plaintiffs–Appellants

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs–Appellants, Harvest Rock Church, Inc. and Harvest International Ministry, Inc., state they are domestic nonprofit corporations incorporated under the laws of the State of California, neither has a parent corporation, and neither issues stock.

Dated: March 19, 2021

/s/ Daniel J. Schmid
Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Nicolai Cocis
Law Office of Nicolai Cocis
25026 Las Brisas Road
Murrieta, CA 95262
(951) 695-1400
nic@cocislaw.com

TABLE OF CONTENTS

DISCLOSURE STATEMENT……………………………………………………...i

TABLE OF CONTENTS……………………………………………………...ii

TABLE OF AUTHORITIES…………………………………………………iv

INTRODUCTION……………………………………………………………1

LEGAL ARGUMENT………………………………………………………...5

I. THIS CASE IS NOT MOOT…………………………………………...5

A. *Catholic Diocese* Compels a Finding that the Instant Appeal is Still a Live Controversy…………………………………………….6

B. Even Assuming *Arguendo* that the Governor Voluntarily Permitted Religious Worship Services, Such Action Does Not Moot the Case…………………………………………………8

C. The Governor's Continued Defense of his Unconstitutional Regime Also Demonstrates that a Lasting Preliminary Injunction is Necessary and that the Instant Matter is Still a Live Controversy…………………………………………………10

II. A PRELIMINARY INJUNCTION IS STILL NECESSARY BECAUSE THE GOVERNOR CONTINUES TO IMPOSE DISCRIMINATORY RESTRICTIONS ON RELIGIOUS WORSHIP IN EVERY TIER………………………………………………...11

A. *South Bay* and *Harvest Rock* Have Already Determined that the Total Ban and All Numeric Capacity Restrictions on Religious Worship Services in California Violate the First Amendment and Should Be Enjoined…………………………………………11

B. The Governor's Contentions that Plaintiffs Have Not Challenged the Capacity Restrictions in Tier I is Demonstrably Fallacious, and His Discriminatory Restrictions in Tier 1 Must Be Enjoined……15

C. The Governor's Discriminatory Restrictions in Tiers 2-4 also Violate the First Amendment under *Catholic Diocese*, *South Bay*, and *Harvest Rock*……………………………………………..19

III. THE GOVERNOR'S PROHIBITION ON SINGING AND CHANTING IN RELIGIOUS WORSHIP SERVICES VIOLATES THE FIRST AMENDMENT AND SHOULD BE ENJOINED……………22

IV. THE GOVERNOR'S BLUEPRINT AND HOSTILITY TOWARDS RELIGION VIOLATES THE ESTABLISHMENT CLAUSE AND SHOULD BE ENJOINED……………………………………………….26

CONCLUSION…………………………………………………………....29

TABLE OF AUTHORITIES

CASES

Already, LLC v. Nike, Inc., 568 U.S. 85 (2013)……………………………………..8

Calvary Chapel Dayton Valley v. Sisolak,
982 F.3d 1228 (9th Cir. 2020)……………………………………………………1

Church of the Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993)…………………………………………………...21, 27

City of L.A. v. Lyons, 461 U.S. 95 (1983)…………………………………………9

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283(1982)……………………8

Comm. for Public Ed. & Religious Liberty v. Nyquist,
413 U.S. 756 (1973)………………………………………………………28

County of Butler v. Wolf, No. 2:20-cv-677,
2020 WL 5510690 (W.D. Pa. Sept. 14, 2020)……………………………..16

Danville Christian Academy v. Beshear, 141 S. Ct. 527 (2020)……………………4

Escobar v. Bowen, 857 F.2d 644 (9th Cir. 1988)…………………………………3

Gateway City Church, No. 20A138,
2021 WL 753575 (U.S. Feb, 26, 2021)…………………….……………2, 3

Gateway City Church v. Newsom, No. 21-151899,
2021 WL 781981 (9th Cir. Feb. 12, 2021)……………………………………1

Gillette v. United States, 401 U.S. 437 (1971)…………………………….…27

Gish v. Newsom, No. 20A120,
2021 WL 422669 (U.S. Feb. 8, 2021)……………………………………………1

Gish v. Newsom, 985 F.3d 891 (9th Cir. 2021)…………………………………...2

Harvest Rock Church v. Newsom, No. 20A94,
2020 WL 7061630 (U.S. Dec. 3, 2020)……………………………………………..2, 3

Harvest Rock Church v. Newsom,
985 F.3d 771 (9th Cir. 2021)…………………………………………...1, 21, 22

Harvest Rock Church v. Newsom,
977 F.3d 728 (9th Cir. 2020)……………………………………………………..5

High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020)………………………..2

Lynch v. Donnelly, 465 U.S. 668 (1984)……………………………………...27

Norman-Bloodsaw v. Lawrence Berkely Lab.,
135 F.3d 1260 (9th Cir 1998)……………………………………………………9

Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1985)……………………………..10

Pierce v. Ducey, No. CV-16-01538-PHX-NVW,
2019 WL 4750138 (D. Ariz. Sept. 30, 2019)……………………………………10

Robinson v. Murphy, No. 20A95,
2020 WL 7346601 (U.S. Dec. 15, 2020)…………………………………………2

Roman Catholic Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63 (2020)……………………………………………………..*passim*

Rosenberger v. Rector & Visistors of Univ. of Va.,
515 U.S. 819 (1995)……………………………………………………………28

South Bay United Pentecostal Church v. Newsom
141 S. Ct. 716 (2021)……………………………………………………*passim*

South Bay United Pentecostal Church v. Newsom,
985 F.3d 1128 (9th Cir. 2021)…………………………………………………...1, 22

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017)…………………………………………………………8

United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018)…………………………..9

Walczak v. EPL Prolong, Inc., 198 F.3d 725 (9th Cir. 1999)..........................3

STATUTES

Fed. R. App. P. 26.1..i

OTHER

Cal. Dep't of Public Health, *Industry Guidance to Reduce Risks*,
https://covid19.ca.gov/industry-guidance/..17, 18, 24

INTRODUCTION

The Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) "represented a seismic shift in Free Exercise law and compels the result in this case." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020). As it did in *Calvary Chapel Dayton Valley*, this Court should find that "[t]he Supreme Court's decision in *Roman Catholic Diocese* compels us to reverse the district court." *Id.* at 1233. As Justice Gorsuch stated in *South Bay United Pentecostal Church v. Newsom*, "[t]oday's orders should have been needless; **the lower courts in these cases should have followed the extensive guidance that this Court already gave**." 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement) (emphasis added).

Unfortunately, some lower courts in California – including this Court in *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021); *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021); *Gish v. Newsom*, 985 F.3d 891 (9th Cir. 2021), and *Gateway City Church v. Newsom*, No. 21-151899, 2021 WL 781981 (9th Cir. Feb. 12, 2021) – are still not following the Supreme Court's clear roadmap laid out in *Catholic Diocese* and have refused to issue injunctive relief against discriminatory restrictions on religious worship services. Notably, the Supreme Court's emergency injunctive relief in *Harvest Rock* came

after it had already vacated this Court's prior denial of injunctive relief. *See Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020).

And, every lower court order denying injunctive relief after *Catholic Diocese* – including twice in the case at bar – has met with the same fate: a Supreme Court order granting certiorari, vacating the denial of injunctive relief, and remanding with instructions to follow *Catholic Diocese*. *See South Bay*, 141 S. Ct. 716; *Harvest Rock Church v. Newsom*, 2021 WL 406257 (U.S. Feb. 5, 2021); *Harvest Rock Church*, 2020 WL 7061630; *Gateway City Church*, No. 20A138, 2021 WL 753575 (U.S. Feb, 26, 2021); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same).

Despite this mounting precedent condemning discriminatory restrictions on religious worship services, the Governor still contends that "[t]he district court did not abuse its discretion in finding that the restrictions on worship services imposed by California's Blueprint are narrowly tailored to meet a compelling interest." (Dkt. 51, Defendant's Answer Brief, "Answer Br.," at 28.) There is no universe in which the Supreme Court grants certiorari **twice** in the same case, vacates the denial of injunctive relief **twice**, and then subsequently issues an injunction pending appeal when there is no abuse of discretion on behalf of the lower courts. And, that is precisely what occurred **twice** in the instant case. *Harvest Rock Church*, 2020 WL

7061630 (vacating this Court and district court's previous denial of a preliminary injunction); *Harvest Rock Church*, 2021 WL 406257, *1 (granting an injunction pending appeal against the Governor's discriminatory restrictions on religious worship). And, if any doubt remained, it was laid to its final resting place in *Gateway City* when the Supreme Court made clear that this Court's refusal to enjoin discriminatory restrictions on religious worship was plainly "erroneous." 2021 WL 753575, at *1.

If a refusal to follow the clear dictates of the Supreme Court's *Catholic Diocese*, *Harvest Rock*, and *South Bay* decisions is clearly erroneous, it was necessarily an abuse of discretion to decline enjoining the Governor's discriminatory restrictions on Plaintiffs' religious worship services. **Indeed, a clearly erroneous legal conclusion is the definition of an abuse of discretion.** *Escobar v. Bowen*, 857 F.2d 644, 645 n.1 (9th Cir. 1988) (noting that "[a]n abuse of discretion occurs if the district court based its decision on an erroneous legal conclusion."); *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (same). Thus, if the Supreme Court has held that a decision not to enjoin the Governor's identical restrictions at issue here was clearly erroneous – which it did, *Gateway City*, 2021 WL 753575, at *1 – and the textbook definition of an abuse of discretion is reaching an erroneous legal conclusion – which it is, *Escobar*, 857 F.2d at 645 n.1 – then the district court's refusal to apply *Catholic Diocese* and enjoin the Governor's discriminatory and

unconstitutional restrictions on Plaintiffs' religious worship services is *ipso facto* an abuse of discretion. The Governor's contention to the contrary is absurd. The Governor's discriminatory restrictions on religious worship services must be enjoined, and the district court's refusal to do so was plainly in error, was an abuse of discretion, and should be reversed.

Plaintiffs have scratched and clawed for **lasting** relief for **250 days** now, and this Court should reverse the district court's refusal to enjoin the Governor from enforcing his discriminatory restrictions on religious worship services. Though the total ban on religious worship services in Tier 1, and 100 and 200-person numerical caps on religious worship in Tiers 2-3 have been enjoined pending appeal, Tiers 1-4 continue to discriminate against Plaintiffs' Churches, as does the singing and chanting ban.

Without a preliminary injunction beyond the current injunctions pending appeal, "nothing would prevent the Governor from reinstating the challenged restrictions tomorrow," which would be "just another sacrifice of fundamental rights in the name of judicial modesty." *Catholic Diocese*, 141 S. Ct. at 71-72 (Gorsuch, J., concurring). The Supreme Court has "**made clear that it would no longer tolerate such departures from the Constitution**." *Danville Christian Academy v. Beshear*, 141 S. Ct. 527, 530 (2020) (Gorsuch, J., concurring) (emphasis added). A failure to reverse the district court is therefore certain to meet the strong headwinds

of the Supreme Court. The result here is clear. The Governor's discriminatory treatment of religious worship services in every Tier, including the singing and chanting ban, violates the First Amendment and must be enjoined beyond the current injunctions pending appeal. Judge O'Scannlain has been correct since October 1, 2020 when he said "[b]ecause California's COVID-19 regulations patently disfavor religious practice when compared to analogous secular activities, I believe that the church is quite likely indeed to succeed on the merits of its challenge to such regulations." *Harvest Rock Church v. Newsom*, 977 F.3d 728, 733 (9th Cir. 2020) (O'Scannlain, J., dissenting). And, after six months and a host of Supreme Court decisions, Judge O'Scannlain's initial conclusion has been vindicated at every step. Plaintiffs have demonstrated **a clear and indisputable right to relief twice** at the Supreme Court, and that necessarily means they are likely to succeed on the merits of their claims here.

LEGAL ARGUMENT

I. THIS APPEAL IS NOT MOOT.

The Governor contends that the instant appeal is moot because the Governor now "permits indoor worship." (Answer Br. at 31.) First, the Governor has never "permitted" Churches to worship in California and only stopped purporting to impose total prohibitions on religious worship services after he was dragged to the Supreme Court numerous times (*South Bay* **twice**, *Harvest Rock* **twice**, *Gish*, and

Gateway City). Second, absent the injunctions pending appeal that were issued in the instant litigation, Plaintiffs would still be suffering under the yoke of the Governor's discriminatory regime, which he has defended at every step and continues to defend here. His vigorous defense proves that lasting injunctive relief is the only mechanism to prevent Plaintiffs from experiencing continued unconstitutional executive edicts in perpetuity. This appeal is still a live controversy.

A. *Catholic Diocese* Compels a Finding that the Instant Appeal is Still a Live Controversy.

Regardless of the Governor's temporary retreat from the worst of his restrictions due to the separate injunctions from this Court and the Supreme Court, the instant matter still presents a live controversy. In *Catholic Diocese*, after the congregations applied for relief, but before their injunction was granted, the Governor removed the restrictions. 141 S. Ct. at 68. After the Governor argued there was no live controversy, the Supreme Court rejected his claims: **"There is no justification for that proposed course of action. It is clear that this matter is not moot."** *Id.* (emphasis added).

> [I]njunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified. The Governor regularly changes the classification of particular areas without prior notice. **If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained**.

Id. (emphasis added) (cleaned up). This Court concluded, "there is no reason why [the congregations] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Id.* at 68–69.

> Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. **So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.**
>
> **To my mind, this reply only advances the case for intervention.** It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. **So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off " switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.**

Id. at 71–72 (Gorsuch, J., concurring) (emphasis added).

As in *Catholic Diocese*, the Governor could impose his restrictions again at any time, as he still defends his Orders. The Governor admits that the Blueprint "is the currently operative framework," (Answer Br. at 20), and the text of that Blueprint explicitly contemplates that the Governor may re-impose more severe restrictions at

any time and move counties into more restrictive tiers. (*See* Blueprint for a Safer Economy, https://covid19.ca.gov/safer-economy/ (last visited March 18, 2021) (noting that counties may move to more restrictive tiers at any time)); (*See also* II-ER-049 (same).)

B. Even Assuming *Arguendo* that the Governor Voluntarily Permitted Religious Worship Services, Such Action Does Not Moot the Case.

Leaving aside the binding injunctions from the Supreme Court and this Court concerning the Governor's unconstitutional restrictions on religious worship, his court-mandated retreat from the worst of his restrictions does not moot the instant appeal. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

> **[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued**. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that **a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur**.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (emphasis added). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."). The Governor "has not carried the 'heavy burden' of making 'absolutely clear' that [he] could not revert to [his]

policy," *id.*, of imposing discriminatory restrictions on religious worship services, because his sudden change in policy is neither permanent nor irrevocable. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983).

The Governor has "neither asserted nor demonstrated that [he] will **never** resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (emphasis added). Rather, the Governor has fought to preserve his discriminatory regime at every turn and continues to do so. (Answer Br. at 28 (arguing that the "district court did not abuse its discretion in finding that the restrictions on worship services imposed by California's Blueprint are narrowly tailored to meet a compelling interest"); *id.* (arguing, despite continuing to impose more severe limitations solely on religious worship services, the new restrictions "avoid the concerns that led the Court to invalidate the ban on indoor worship services"); *id.* at 29 (arguing, in direct contradiction to *Catholic Diocese*, *South Bay*, and *Harvest Rock*, that issuing an injunction against the Governor's discriminatory treatment of Plaintiff's religious worship services "would harm the public interest").)

The Governor has not disavowed reinstatement of unconstitutional restrictions and has explicitly preserved the right to do so again. **In fact, to this day, Tiers 1-4 continue to discriminate against churches**. This unending discriminatory regime precludes mootness. *Cf. United States v. Sanchez-Gomez*, 138

S. Ct. 1532, 1537 n.* (2018) (holding, where intent to reinstate, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . ."); *id* at *5–6 ("The Court is not fooled.").

C. The Governor's Continued Defense of his Unconstitutional Regime Also Demonstrates that a Lasting Preliminary Injunction is Necessary and that the Instant Matter is Still a Live Controversy.

A case is not moot where, as here, the Governor "did not voluntarily cease the challenged activity because he felt [it] was improper," and "has at all times continued to argue vigorously that his actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985); *Pierc*e, 2019 WL 4750138, at *5 ("[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case.").

The Governor continues to assert that his previous orders were constitutional. (Answer Br. at 27-29.) "There is nothing in the parties' submissions or the record to demonstrate the Governor changed his mind about the merits of Plaintiff[s'] claim." *Pierce*, 2019 WL 4750138, at *6. "The Governor did not experience a change of heart that may counsel against a mootness finding." *Id.* "Given the importance of the issues at bar . . . the public interest in having the legality of the Governor's behavior settled weighs against a mootness ruling." *Id.* at *7.

II. A PRELIMINARY INJUNCTION IS STILL NECESSARY BECAUSE THE GOVERNOR CONTINUES TO IMPOSE DISCRIMINATORY RESTRICTIONS ON RELIGIOUS WORSHIP IN EVERY TIER.

A. *South Bay* and *Harvest Rock* Have Already Determined that the Total Ban and All Numeric Capacity Restrictions on Religious Worship Services in California Violate the First Amendment and Should Be Enjoined.

The Governor contends that this Court and the Supreme Court have "considered the capacity restrictions imposed by California on multiple occasions, and have consistently recognized that they are limited and reasonable." (Answer Br. at 33.) This contention is at war with reality. In fact, a clear majority of the Supreme Court has found that the Governor's capacity restrictions on religious worship are unconstitutional. In *South Bay*, which addressed the very restrictions at issue here, a majority of Justices all concluded that the capacity restrictions were discriminatory and should be enjoined. *South Bay*, 141 S. Ct. at 716 (noting that Justices Thomas and Gorsuch would have granted the applications in full, including the capacity restrictions in each Tier at issue here); *id.* (noting that Justice Alito would have granted the applications in full but given the state 30 days to present evidence supporting the necessity of its capacity restrictions); *id.* at 717 (Barrett, J., and Kavanaugh, J., concurring in part) (noting that their only hesitation in granting the applications in full was limited to the singing and chanting prohibition); *id.* at 717-18 (Gorsuch, J., joined by Thomas, J. and Alito, J., concurring in part) (explaining why the entire regime is unconstitutional).

The breakdown of the Justices' votes and opinions demonstrates that the preliminary injunction should issue as to the discriminatory capacity restrictions on religious worship services. As Justice Gorsuch stated, "[s]ince the arrival of COVID-19, California has openly imposed more stringent regulations on religious institutions than on many businesses." 141 S. Ct. at 717 (Gorsuch, J., joined by the Thomas, J. and Alito, J.). In fact, as is still true to this day, "[t]he State's spreadsheet summarizing its pandemic rules even assigns places of worship their own row," and "**is the only State in the country that has gone so far as to ban *all* indoor religious services**." *Id.* (bold emphasis added). He continued,

> Of course, we are not scientists, but **neither may we abandon the field when government officials with experts in tow seek to infringe constitutionally protected liberty.** The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. . . . **Even in times of crisis—perhaps *especially* in time of crisis—we have a duty to hold governments to the Constitution**.

Id. at 718 (bold emphasis added). In short, California failed to "explain why it cannot address its legitimate concerns with rules" that do not discriminate against religious worship services, and those failures "**are telltale signs that this Court has long used to identify laws that fail strict scrutiny**." *Id.* (emphasis added).

Justice Gorsuch concluded, which is equally true today under the new restrictions and discriminatory percentage caps, "**[w]hen a State so obviously targets religion for different treatment, our job becomes much clearer**." *Id.* at

717 (emphasis added). And, because that job was much clearer due to the Governor's overt hostility towards religion in every Tier, Justice Gorsuch and Justice Thomas would have voted to grant the applications "in full," which would have enjoined the Governor's discriminatory total ban on religious worship as well as the discriminatory percentage restrictions still in place today. *Id.* at 716.

Justice Alito, in turn, "would grant the applications **with respect to all of the capacity restrictions on indoor worship services**," but would have stayed the injunction for 30 days. *Id.* (Alito, J., concurring). His only divergence from Justices Thomas and Gorsuch's vote to enjoin the entire discriminatory scheme was to permit the State 30 days to "demonstrate[] clearly that nothing short of those measures will reduce the community spread of COVID-19 at indoor religious gatherings to the same extent as do the restrictions the State enforces with respect to other activities it classified as essential." *Id.* Given that the State has had more than 30 days since the Supreme Court issued its decision (42 days, in fact), and the Governor has put forward no further evidence to support his discriminatory restrictions, Justice Alito would likewise enjoin the Governor's discriminatory treatment houses of worship.

Finally, in addition to the three votes to enjoin all discriminatory percentage capacity restrictions by Justices Thomas, Gorsuch, and Alito, Justices Barrett and Kavanaugh likewise agreed with Justice Gorsuch's opinion that such discriminatory restrictions should be enjoined. Indeed, Justice Barrett's opinion, which was joined

by Justice Kavanaugh, "agree[d] with Justice Gorsuch's statement, save its contention that the Court should enjoin California's prohibition on singing and chanting during indoor services." *Id.* at 717 (Barrett, J., with Kavanaugh, J.). Both Justice Barrett and Kavanaugh would likewise have voted to grant the applications "in full," which would have enjoined the Governor's discriminatory total ban on religious worship as well as the discriminatory percentage restrictions still in place today. *Id.* at 716 (Gorsuch, J.). **While the decision was 6-3, it is clear that at least five of the Justices would enjoin the discriminatory restrictions as they stand today**.

Thus, the Governor's notion that "[t]he district court did not abuse its discretion in finding that the restrictions on worship services imposed by California's Blueprint are narrowly tailored to meet a compelling interest," (Answer Br. at 28), is absurd. Indeed, a clear majority of the Supreme Court has already found – with respect to the precise regulations at issue here – that the State's discriminatory restrictions, including the current discriminatory capacity restrictions in every Tier, violate the First Amendment. *Catholic Diocese*, 141 S. Ct. at 66 (noting that "applicant have clearly established their entitlement to relief"); *South Bay*, 141 S. Ct. at 716 (enjoining California's discriminatory total prohibition on religious worship services); *Harvest Rock*, 2021 WL 406257, at *1 (same). As shown *infra*,

the discriminatory regime found unconstitutional by the Supreme Court in each of its COVID-19 decisions on religious worship is still present in every Tier today.

B. The Governor's Contentions that Plaintiffs Have Not Challenged the Capacity Restrictions in Tier I is Demonstrably Fallacious, and His Discriminatory Restrictions in Tier 1 Must Be Enjoined.

The Governor contends that Plaintiffs have not challenged the capacity restrictions in Tier 1, so this Court cannot enter injunctive relief. (Answer Br. at 32.) This is incorrect. First, Plaintiffs explicitly challenged the Governor's discriminatory treatment of religious worship services in all Tiers, including Tier 1, from the inception of this litigation. (III-EOR-252, V. Compl. ¶165 (noting that the "Governor's orders, on their face and as applied, target Plaintiffs' sincerely held religious beliefs by prohibiting **or numerically restricting** religious gatherings" (emphasis added)).) Plaintiffs' challenge therefore included the discriminatory restrictions in Tier 1. That the Governor "changed" the restrictions mid-stream because the Supreme Court and this Court forced him to eliminate his unconstitutional restrictions is not justification to permit him to continue to impose newly minted discriminatory restrictions and evade review. That is precisely the argument that *Catholic Diocese* rejected. 141 S. Ct. at 68 ("**injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified" and the discriminatory restrictions re-imposed** (emphasis added)).

That is also the logical conclusion to draw in this seemingly unending COVID era. Indeed, "[t]he ongoing and indefinite nature of Defendants' actions weigh strongly against" granting leeway for the Governor's actions. *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 5510690, *8 (W.D. Pa. Sept. 14, 2020).

> The extraordinary emergency measures taken by [the Governor] in this case were promulgated beginning in March—six months ago. What were initially billed as temporary measures necessary to "flatten the curve" and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end—stopping the spread of an infectious disease and preventing new cases from arising—which requires ongoing and open-ended efforts. Further, while the harshest measures have been "suspended," Defendants admit that they remain in-place and can be reinstated *sua sponte* as and when Defendants see fit. **In other words, while not currently being enforced, Pennsylvania citizens remain subject to the re-imposition of the most severe provisions at any time.** Further, testimony and evidence presented by Defendants does not establish any specified exit gate or end date to the emergency interventions. **Rather, the record shows that Defendants view the presence of disease mitigation restrictions upon the citizens of Pennsylvania as a "new normal" and they have no actual plan to return to a state where all restrictions are lifted. It bears repeating; after six months, there is no plan to return to a situation where there are no restrictions imposed upon the people of the Commonwealth**.

Id. (emphasis added).

The same is true here, only worse. The Western District of Pennsylvania's opinion was penned only six months into the COVID era's treatment of religious worship services. After an entire year, California is continuing to treat religious worship services less favorably than other comparable gatherings. (Dkt. 3-1, Addendum to Motion for Injunction Pending Appeal, "IPA Addendum," at 44.) If

continuing restrictions were too much for the First Amendment to bear in September 2020, how much more so is it now – **six months later and almost an entire year into the unconstitutional regime**. Justice Gorsuch addressed this very issue in *South Bay*.

> No doubt, California will argue on remand, as it has before, that its prohibitions are merely temporary because vaccinations are underway. But **the State's "temporary" ban on indoor worship has been in place since August 2020, and applied routinely since March. California no longer asks its movie studios, malls, and manicurists to wait. And one could be forgiven for doubting its asserted timeline. Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner**. **As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could**. Drafting narrowly tailored regulations can be difficult. But **if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry**.

South Bay, 141 S. Ct. at 720 (Gorsuch, J., statement) (emphasis added). The time has come to put a stop to the perpetual discriminatory restrictions imposed solely on religious worship services.

In Tier 1, while the Supreme Court's injunction eliminated the total prohibition on religious worship services, discriminatory percentage restrictions of 25% still single out religious worship for especially harsh treatment in direct contradiction to *Catholic Diocese*. (Answer Br. at 26 (citing Cal. Dep't of Public

Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Places of Worship and Cultural Ceremonies").) **Yet, there are still a myriad of activities that are not restricted to 25% capacity, and many such industries are identical to those the Supreme Court has constantly held unconstitutionally discriminatory**. (*See* dkt. 40, Opening Brief at 13-18.)

In Tier 1 **and every Tier**, food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations, and a host of other exempt activities that are not subject to any capacity or numerical restriction whatsoever. (*See* IPA Addendum, at 44.) Grocery stores and certain other retail stores are permitted to operate at 50% capacity. (*Id.*) **Thus, California still exempts scores of so-called critical infrastructure sectors from any capacity restriction and continues to permit many additional secular gatherings in Tier 1 with higher capacities than churches.**

It does not matter than the current restrictions in Tier 1 are more favorable to churches than they were prior to the IPA, or that the Governor may point to some secular businesses that are subject to similar capacity restrictions. Indeed,

> under [the Supreme] Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. . . . **Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class**.

Catholic Diocese, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (emphasis added).

Because California still limits religious worship services to 25% capacity while completely exempting large swaths of other industries from any restriction and permits grocery stores and certain other retail to operate at 50% capacity, the State is still discriminating against religious worship services.

C. The Governor's Discriminatory Restrictions in Tiers 2-4 also Violate the First Amendment under *Catholic Diocese*, *South Bay*, and *Harvest Rock*.

The percentage capacity restrictions are also unconstitutionally discriminatory against religious worship services in Tiers 2-4. As the Supreme Court noted in both *South Bay* and *Harvest Rock*, the injunction was without prejudice to showing that the percentage capacity restrictions in other Tiers was also discriminatory. *South Bay*, 141 S. Ct. at 716; *Harvest Rock*, 2021 WL 406257, at *1. *See also South Bay*, 141 S. Ct. at 719 n.1 ("nothing in our order precludes future challenges to the other disparate occupancy caps applicable to places of worship, particularly in 'Tiers' 2

through 4) (Gorsuch, J., statement)). As the record in the instant appeal demonstrates, the percentage capacity restrictions in Tiers 2-4 are still unconstitutionally discriminatory.

As in Tier 1, a host of critical infrastructure sectors continue to operate without any numerical or percentage capacity restriction whatsoever. Food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations, and a host of other exempt activities that are not subject to any capacity or numerical restriction whatsoever. (*See* Dkt. 3-1, Addendum to Motion for Injunction Pending Appeal, at 44; (II-ER-054-055; III-ER-310-332, V. Compl. Ex. G).)

These exemptions for critical infrastructure continue in Tiers 2-4. Yet, in Tier 2, Churches are restricted to 25% capacity for indoor worship. (II-ER-049.) Grocery and "essential" retail stores (e.g., Walmart, Costco, and 'big box' stores), shopping centers, malls, destination centers, and swap meets in Tier 2 may operate at 50% capacity (II-ER-054-055). Churches in Tier 3 are restricted to 50% capacity

for indoor worship. (II-ER-050.) And, in Tier 4, Churches are restricted to 50% capacity for indoor worship. (II-ER-050.) At every turn religious worship services are treated worse. Thus, the discriminatory restrictions in Tiers 2-4 "single out religious worship services for especially harsh treatment." *Catholic Diocese*, 141 S. Ct. at 66, and violates the First Amendment.

The Governor contends that Plaintiffs have not argued against the capacity restrictions in Tiers 2-4. (Answer Br. at 32.) This is utter balderdash. Plaintiffs requested injunctive relief against the discriminatory percentage caps in every Tier, including the disparate treatment in Tiers 2-4. (Dkt. 3-1, estrictions imposed on Plaintiffs' worship services violates the Free Exercise Clause). Indeed, if Plaintiffs had not challenged the discriminatory restrictions imposed on Plaintiffs' worship services in every Tier, why would this Court have enjoined the numerical caps at issue in Tiers 2-4? *Harvest Rock Church*, 985 F.3d at 771.

Moreover, because the restrictions at issue in Tiers 2-4 treat Plaintiffs' Churches less favorably than other secular businesses, they "violate 'the minimum requirement of neutrality' to religion." *Catholic Diocese*, 141 S. Ct. at 66 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). Indeed, "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. . . . **[C]ourts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain**." *Id.* at 70 (Gorsuch, J.,

concurring) (emphasis added). And, here, applying the Free Exercise Clause demands that the remaining discriminatory percentage restrictions against religious worship services in Tiers 2-4 be enjoined. Put simply, "[i]t is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Id.* at 72. As Judge O'Scannlain made clear: "**A simple, straightforward application of these controlling cases compels what should be the obvious result here: California's uniquely severe restrictions against religious worship services . . . are patently unconstitutional and should be enjoined**." *Harvest Rock Church*, 985 F.3d at 772 (O'Scannlain, J., concurring) (emphasis added).

III. THE GOVERNOR'S PROHIBITION ON SINGING AND CHANTING IN RELIGIOUS WORSHIP SERVICES VIOLATES THE FIRST AMENDMENT AND SHOULD BE ENJOINED.

The Governor contends that Plaintiffs' arguments concerning the unconstitutionality of the singing and chanting prohibition is foreclosed by this Court's decision in *South Bay*, 985 F.3d at 1152 (Answer Br. at 45.) This is incorrect. In fact, the Supreme Court explicitly left the door open for Plaintiffs' challenges to the singing and chanting ban, despite this Court's opinion. *South Bay*, 141 S. Ct. at 716 (noting that the injunction was without prejudice to Plaintiffs' showing that the

State was not applying "the prohibition on singing and chanting in a generally applicable manner"); *Harvest Rock*, 2021 WL 406257, at *1 (same).

Justices Thomas, Gorsuch, and Alito would have enjoined the singing and chanting restriction. Justice Gorsuch noted, "[i]t seems California's powerful entertainment industry has won an exemption. So, once more, **we appear to have a State playing favorites during a pandemic, expending considerable effort to protect lucrative industries (casinos in Nevada; movie studios in California) while denying similar largesse to the faithful**." *South Bay*, 141 S. Ct. at 719 (emphasis added). Justices Kavanaugh and Barrett would enjoin the singing and chanting ban, but withheld their vote on this issue because the standard for an IPA is a clear and indisputable right to relief based on the record. However, Justices Barrett and Kavanaugh, stated: "if a chorister can sing in a Hollywood studio but not in her church, California's regulations cannot be viewed as neutral." *Id.* at 717.

As Justice Gorsuch stated, "[t]he Court's order today at least allows the applicants to press these points on remand." *South Bay*, 141 S. Ct. at 720. *See also id.* at 717 (Barrett, J., concurring) ("the applicants remain free to show that the singing ban is not generally applicable and to advance their claim accordingly"). And, though the Governor has retreated from his unconstitutional total prohibition on singing and chanting in religious worship services, even his new regime imposes

discriminatory restrictions on religious worship services that are not imposed on nonreligious movie, film, and television production studios. (Answer Br. at 47.)

The Governor contends that the new guidance permits religious worship services to include "performers (but not congregants in the audience) to engage in singing, chanting, and similar vocalizations during indoor services subject to a masking requirement in all tiers and a limit of 10 vocal performers and enhanced distancing in Tier 1." (Answer Br. at 46 (citing Cal. Dep't of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Places of Worship and Cultural Ceremonies").) So, Plaintiffs' Churches may now have singing from a 10-person performance choir, **but to avoid the threat of a one-year jail sentence**, the church choir must not be 11 or more (no matter the size of the sanctuary), and the congregants may not sing or chant at all, despite their sincerely held religious beliefs that compel them to do so. (III-ER-219, V. Compl. ¶¶60-64.) Nevertheless, certain nonreligious gatherings are permitted to have indoor singing and chanting **without any mention of any numerical restrictions**. (Answer Br. at 47 (noting that movie, film, and television productions are permitting to record indoor singing and chanting without any numerical limitation).) Though there appears to be a new requirement that no live audiences be present for the recording, there is nothing that restricts music, film, and television productions from having more than ten performers. **This discriminatory numerical restriction of 10-people**

for churches no matter the size of the sanctuary meets the same fate as the 100 and 200 numerical restrictions enjoined in Tiers 2-3. *Catholic Diocese*, 141 S. Ct. at 67-68 ("If only 10 people [may sing in] each service, the great majority of those who wish to [exercise their sincerely held religious beliefs] will be barred."). The Governor continues to impose discriminatory numerical caps (albeit slightly better than the previous total prohibition) that single out religious music for "especially harsh treatment." *Catholic Diocese*, 141 S. Ct. at 66.

Thus, the problem Justice Gorsuch expressed, along with Justices Thomas and Alito, is still present here. *South Bay*, 141 S. Ct. at 719. More importantly, in addition to Justices Gorsuch, Thomas, and Alito's opinion that the singing and chanting prohibition violates the First Amendment and should be enjoined, under the discriminatory restriction imposed by the Governor's numerical cap applicable only to religious worship service singing, Justices Barrett and Kavanaugh likewise found that such discrimination would violate the First Amendment. While up to ten choristers can sing in Plaintiffs' Churches now, there is no such numerical limit on singing applicable to movie, film, or television studios. And, the fact only now – after the Supreme Court suggested the discriminatory singing ban would likewise violate the First Amendment – suggests the Governor knows his restrictions are unconstitutional. (Answer Br. at 46-47.) So, again, the singing and chanting impermissibly discriminates against religious worship, *Catholic Diocese*, 141 S. Ct.

at 66, just like the constitutionally infirm percentage and numerical restrictions enjoined by the Supreme Court on previous occasions.

As Justice Gorsuch stated, the current restrictions "suggests that music, film, and television studios *are* permitted to sing indoors. See Record in No. 20–56358, Doc. 18–4, p. 124 (CA9) (decl. of Screen Actors Guild General Counsel) ("Singing in larger groups [inside the studio] is permitted but only . . . . with additional protections.")). *South Bay*, 141 S. Ct. at 719 n.2 (emphasis original). And, even though the Governor now permits 10 people to sing in Church, they are – yet again – not afforded the same leniency granted to the favored entertainment industry. Thus, the singing and chanting prohibition is not neutral or generally applicable, and thus violates the First Amendment under *Catholic Diocese*, *South Bay*, and *Harvest Rock*.[1]

IV. THE GOVERNOR'S BLUEPRINT AND HOSTILITY TOWARDS RELIGION VIOLATES THE ESTABLISHMENT CLAUSE AND SHOULD BE ENJOINED.

The Governor contends that the Supreme Court has rejected Plaintiffs' Establishment Clause claims. (Answer Br. at 48.) This is simply incorrect. The Supreme Court did not address Plaintiffs' Establishment Clause claims, but that is

[1] To the extent there remains any confusion over the general applicability and neutrality of the singing and chanting ban, the Governor is not entitled to the benefit from his self-created lack of clarity. Indeed, this Court should "not allow the government official who California's complex regime to benefit from its confusing nature." *South Bay*, 141 S. Ct. at 719 n.2 (Gorsuch, J.)

wholly different than rejecting them. In *South Bay* and *Harvest Rock*, the Supreme Court issued injunctions based on the Free Exercise Clause, so there was no need to engage in additional analysis when the injunction was already being issued on another mode of analysis. However, the Court's Free Exercise analysis bears equal weight in the Establishment Clause context.

As the Supreme Court has made plain, "[a]n attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—**the purpose of ensuring governmental neutrality in matters of religion**." *Gillette v. United States*, 401 U.S. 437, 449 (1971) (emphasis added). Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and **forbids hostility towards any**." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (emphasis added). The requirement of neutrality was found to have been violated in *Catholic Diocese*, *South Bay*, and *Harvest Rock*. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 66 ("The applicants have made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." (citing *Lukumi*, 508 U.S. at 533)); *South Bay*, 141 S. Ct. at 717 (Gorsuch, J.) (noting that California's Blueprint fails the fundamental requirement of neutrality because "[s]ince the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses."); *id.* at 719 ("**California singles out religion for worse treatment**

than many secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests. Recently, this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution."); *Harvest Rock*, 2021 WL 406257, at *1 (enjoining California's discriminatory total prohibition for the same reasons as *South Bay*).

Because "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of **neutrality** toward religion," *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973), transgression into hostility towards religious worship plainly violates the Establishment Clause. Indeed, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector & Visistors of Univ. of Va.*, 515 U.S. 819, 839 (1995). Because the Supreme Court has already found that California's discriminatory restrictions against religious worship services fail the minimum requirement of neutrality, *South Bay*, 141 S. Ct. at 717 (Gorsuch, J.), the discriminatory restrictions necessarily violate the Establishment Clause.

The district court's conclusion that "[r]estrictions on religious activity which are the same as restrictions on secular activity do not constitute government establishment—or disavowal—of religion." (I-ER-013). But, that conclusion is

clearly erroneous because, as the Supreme Court held in *Harvest Rock* and *South Bay*, the Governor's Blueprint does not treat religious worship services the same as nonreligious gatherings of like kind. In fact, they are explicitly hostile to religious worship services and single them out for "especially harsh treatment." *Catholic Diocese*, 141 S. Ct. at 66. That plainly violates the Establishment Clause, and the Blueprint's discriminatory restrictions on religious worship services in every Tier should be enjoined.

CONCLUSION

For the foregoing reasons, the district court should be reversed and the preliminary injunction issued.

Respectfully submitted,

Dated: March 19, 2021

/s/ Daniel J. Schmid
Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Nicolai Cocis
Law Office of Nicolai Cocis
25026 Las Brisas Road
Murrieta, CA 95262
(951) 695-1400
nic@cocislaw.com

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and 9th Cir. Rule 27-1(d). This document is proportionally spaced and, not counting the items excluded from the length by Fed. R. App. P. 32(f), contains 6,995 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellants