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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

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

Plaintiffs,

v.

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

Defendant.

Case No. 2:20-cv-06414

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARYINJUNCTION

The Honorable Jesus G. Bernal
Hearing: August 12, 2020
2:00 PM PDT

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I. UNDER THIS COURT'S OWN ORDERS, PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE EXERCISE CLAIM.

A. The Governor's Public and Unequivocal Support of Thousands of Protesters While Banning Worship Services Shows Discrimination Under the First Amendment.

The Governor contends that the precedent from California, this Court, and the Supreme Court all shows that Plaintiffs are unlikely to succeed on the merits because courts have rejected similar challenges. (Dkt. 31, Opposition to Motion for Preliminary Injunction, "Opposition," at 7). The fatal flaw in the Governor's argument, however, is that all such cases were brought **before** the Governor decided to publicly support and encourage hundreds of thousands of protesters in flagrant violation of his Orders. That decision, and the requisite forbearance of any prohibitions on mass protests, "has consequences." *Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J, concurring).

1. The Governor's prohibiting worship services while encouraging flagrant violations of his own Orders distinguishes this case from *Gish*.

In *Gish v. Newsom*, No. EDCV 20-755 JCB (KKx), this Court denied a temporary restraining order because it found that the Governor was not treating religious worship services differently than other gatherings that were also prohibited under the orders. 2020 WL 1979970, at *6 (C.D. Cal. Apr. 23, 2020). Further, this Court held that religious gatherings were not similarly situated to so-called "essential services," and thus the disparate treatment afforded to them was constitutional. *Id.*[1] While that, arguably, may have been true then, **it certainly is not true now**. As this Court noted, the relevant comparison for Plaintiffs' religious worship services, in terms of First Amendment scrutiny, is whether the Governor is treating similar gatherings equally in

[1] Plaintiffs respectfully disagree with this Court's finding that the government may treat so-called "essential business" differently than religious gatherings of like kind. The First Amendment prohibits such discriminatory treatment and disparate classifications. (*See* Dkt. 4-1, Memorandum in Support of Motion for TRO and Preliminary Injunction, at 10–12).

terms of the Orders' prohibitions. *Id.* ("constitutional analysis only requires that the Court compare the prohibited religious conduct with analogous secular conduct"). **The Governor's treatment of mass protests and demonstrations, attended by hundreds of thousands of people, represents a sea change in the application of his Orders**.

In *Gish*, this Court stated:

> An in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. Instead, **it is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience.** Because the Orders treat in-person religious gatherings the same as they treat secular in-person communal activities, they are generally applicable.

Id. (emphasis added).

Assuming *arguendo* that the Governor can treat "big box" stores such as Walmart, Target, Lowe's, and Home Depot differently than Plaintiffs' religious services, a point Plaintiffs do not concede, this Court's *Gish* decision confirms that the Governor has transgressed into unconstitutional territory by treating religious worship services differently than the "communal activities" of non-religious mass protest gatherings. *Id.* As Plaintiffs' Verified Complaint demonstrated beyond cavil, nearly 100,000 protesters were permitted to gather in close quarters in Hollywood on June 8, 2020 (Dkt. 1, Verified Complaint, ¶ 112); 15,000 people gathered in Oakland on June 2 (*id.* ¶ 115); and thousands more gathered together in the protests in San Diego, Sacramento, Martinez, and all across California (*id.* ¶¶ 113, 114, 116, 117). Yet, the Governor did not prohibit such mass gatherings and did not attempt to punish any of the flagrant violations of his Orders. In fact, just the opposite, **the Governor openly and publicly encouraged the protesters gathering by the hundreds of thousands** (V. Compl. ¶¶ 104-11), **thanked them for violating his Orders** (*id.* ¶ 107), and **asked them to keep violating his Orders** (*id.* ¶ 104).

Plaintiffs' Verified Complaint plainly demonstrates that the Governor has not only permitted, but encouraged, secular gatherings attended by hundreds of thousands of people. The Governor argues several times that there is "no evidence" he "encouraged" the protests. (Opp'n 16, 18). That is demonstrably false. On June 1, the Governor, in reference to the protesters, stated: "Thank you! God bless you. **Keep doing it**." (V. Compl. ¶ 104 (emphasis added)). And, on the same day, the Governor explicitly stated to protesters: "your rage is real, **Express it so that we can hear it**." (*Id.*, ¶ 109 (emphasis added)). These are no mere expression of support but are open statements of encouragement that the protesters continue their demonstrations. If telling protesters to "Keep doing it" is not an expression of encouragement, then nothing is.

Yet, at the same time, the Governor continues to assert that appropriately distanced gatherings at religious services must be prohibited to stop the spread of COVID-19. Under *Gish*, the gathering by the hundreds of thousands of protesters is virtually identical to a concert attended by thousands of excited fans, and all of the thousands of protesters were unquestionably sharing a "communal experience." 2020 WL 1979970, at *6. Because the Governor has treated those protests and gatherings of hundreds of thousands differently than religious gatherings (which do not include hundreds of thousands), he has violated the First Amendment—even under this Court's own holdings. The Governor's flagrant and disparate treatment of the communal activity of religious services and the communal activity of thousands of protesters cannot be reconciled with this Court's *Gish* decision.

As Judge Ho's reasoned opinion discussed,

> For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? **The answer is that they can't.** Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."

Spell, 962 F.3d at 181 (emphasis added).

Governor Newsom "could have also been silent," but he chose to encourage and publicly support secular gatherings of hundreds of thousands while still imposing draconian restrictions on Plaintiffs' religious worship services. *See Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742, *12 (N.D.N.Y. June 26, 2020). But, "by acting as [he] did, Governor [Newsom] sent a clear message that mass protests are deserving of special treatment," *id.*, and the Governor's policy of "freedom for me, but not for thee, **has no place under our Constitution**." *Spell*, 762 F.3d at 183 (emphasis added).

2. The Governor's reliance on the non-binding and non-precedential concurrence of Chief Justice Roberts in *South Bay* is wholly misplaced.

The Governor also contends, erroneously, that Plaintiffs have altogether ignored Chief Justice Roberts' lone concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). (Opp'n 1). But *South Bay*'s relevance to the instant proceedings is dubious at best. The 5-4 decision, with no majority opinion, involved an entirely different standard than that applicable to Plaintiffs' Motion, and is neither binding nor precedential.

a. *South Bay* involved an entirely different standard.

South Bay involved a standard far higher than that imposed on Plaintiffs at the preliminary injunction stage, which standard was the focus of the Chief Justice's concurrence. The petitioners in *South Bay* sought an emergency writ of injunction under 28 U.S.C. §1651, which is governed by an extraordinarily high standard and "demands a significantly higher justification" than even a request for a stay. *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). Indeed, the Chief Justice said so: "This power is used where 'the legal rights at issue are indisputably clear' and, even then, 'sparingly and only in the most critical and exigent circumstances.'" *South Bay*, 140 S. Ct. at 1613. *See also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (quoting *Fisherman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). It was only based

on this exceedingly high standard that the Chief Justice (by himself) suggested that a writ of injunction should not issue. Courts tasked with determining the relevance of Chief Justice Roberts' lone concurrence have noted the different standards at issue. *See, e.g.*, *Ramsek v. Beshear*, No. 3:220-cv036-GFVT, 2020 WL 3446249, *5 (E.D. Ky. June 24, 2020) (concluding proper reading of the concurrence "simply leads to the conclusion that Justice Roberts found that it was not 'indisputably clear' that the California law restricting in-person religious services violated the Free Exercise Clause").

Here, by contrast, Plaintiffs are not required to demonstrate that their right to relief is "indisputably clear." All Plaintiffs need to establish is a likelihood or "probability" of success on the merits, that Plaintiffs will suffer irreparable harm absent injunctive relief, that the balance of the equities favors an injunction, and that the public interest is served by that injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, in the Ninth Circuit, Plaintiffs need only establish that there are "serious questions going to the merits" and that the balance of equities favors injunctive relief. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). As the above discussion demonstrates (*supra* Section I.A.1), under this Court's *Gish* decision, there is little doubt that serious questions exist as to whether the Governor may continue to prohibit religious worship services while openly and publicly supporting and encouraging hundreds of thousands of protesters gathering in close quarters for communal activities with no restriction. *See supra* Section I.A.1.

b. Chief Justice Roberts' lone concurrence is not precedential.

Neither the Supreme Court's decision denying the extraordinary writ of injunction nor Chief Justice Roberts' lone concurrence is binding. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting) ("Denials of certiorari **never** have precedential value, and the **denial of a stay can have no precedential value either** . . . ." (emphasis added) (citations omitted)); *South Bay*, 2020 WL 2813056, at *1 (Roberts, C.J., concurring) (noting writ of injunction pending appeal "demands a

significantly higher justification than a request for a stay"); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014) (advising grant of writ of injunction pending appeal "should not be construed as an expression of the Court's views on the merits"); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 312 (3d Cir. 2013) ("[F]ederal courts should not give 'much precedential weight' to a concurring opinion.").

Moreover, though equal in precedential value (*i.e.*, none), the Governor fails to mention the sharp and robust dissent of Justice Kavanaugh in *South Bay* (joined by two other justices) in which he explained convincingly why Governor Newsom's restrictions "indisputably discriminate[] against religion, and such discrimination violates the First Amendment." 140 S. Ct. at 1615. Indeed, in *Ramsek*, much like the Governor here, the government argued that *South Bay* was essentially the nail in the coffin for Free Exercise challenges during COVID-19. 2020 WL 3446249, at *5. There, however, the court appropriately recognized that "while informative, Chief Justice Roberts' concurring opinion **does not create precedent which controls this case**." *Id.* (emphasis added). And, furthermore, "if the concurring opinion is to be accorded weight, then **the fact that no other Justices joined the opinion must be acknowledged and considered**." *Id.* (emphasis added). Like the *Ramsek* court, this Court should "decline[] to accord too broad of a precedential effect to Justice Roberts' concurrence in *South Bay*." *Id.*

B. The Governor Admits a First Amendment Violation by Conceding That Plaintiffs May Provide *Some* Religious Services, While Prohibiting *Worship* Services.

Interestingly, the Governor does not contest, and in fact concedes, that Plaintiffs are permitted to provide some religious services in their buildings (feeding, counseling, sheltering), but that Plaintiffs are in direct violation of the Governor's Orders the moment such services turn into a worship service. (Opp'n 15). The Governor's only defense of his discriminatory and arbitrary dichotomy between such services is that Plaintiffs did not allege they provide such services **in their sanctuaries**. (*Id.*). This is

a *non sequitur*.

Plaintiffs plainly allege and verify that their ministries provide food, counseling, and other necessities of life to those in need in their communities, and that they do so at their churches. (V. Compl. ¶¶ 51, 55). The exemption applies to **any gathering** (regardless of location, room, or building) where Plaintiffs or other individuals are providing "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals." (V. Compl. ¶ 99, Ex. D at 20, Ex. G at 23). Thus, the issue is not which of Plaintiffs' church buildings or spaces are being used; the issue is that, in **any** of Plaintiffs' facilities, their people can assemble with unlimited others to provide food, shelter, and counseling, but cannot worship—preach a hopeful message, sing hymns of praise, or offer prayers for the assembled individuals—on the same terms. People can receive food, but not take communion. People can be housed overnight, but cannot hold a short worship service, Bible study, or meet for prayer. People can receive counseling to find work, but cannot be counseled on finding eternal life. **The question has nothing to do with space, and everything to do with what can be done in that space**. Under the Governor's system, some categories of indoor, in-person religious exercise are permitted, while others are prohibited in the same space.

No matter, says the Governor, because Plaintiffs have not demonstrated that the risk of virus transmission of an unlimited number of people gathering for food, counseling, or other necessities of life in the same building is the same as that of a worship service. (Opp'n 15). This is absurd because is the Governor's burden to prove the justification for his distinctions, not the Plaintiffs' burden to disprove them. "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Plaintiffs] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the orders]." *Ashcroft v. ACLU*, 542

U.S. 656, 666 (2004) (emphasis added). Binding Supreme Court precedent does not permit the Governor to shift the burden to Plaintiffs.

Moreover, the Governor cannot carry his burden because his own "evidence" is illusory. The Governor stakes his justification for his discriminatory Orders on "numerous reports" of worship services becoming "'super-spreader'" events (Opp'n 19), but cites no relevant or admissible evidence in support. First, the Governor's ostensible expert makes numerous broad assumptions and generalizations about transmission risk, but not a single material statement is supported by a study, report, or other authority, which relegates his statements to the inadmissible categories of speculation and *ipse dixit*. (Dkt. 31-2, Decl. James Watt, M.D., M.P.H.). As the Supreme Court has explained, "nothing in either *Daubert [v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)] or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data **only by the *ipse dixit* of the expert**." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (emphasis added).

Second, the Governor apparently expects the Court to take judicial notice of numerous mere news reports of COVID-19 transmission purportedly connected to churches (Opp'n 19–20, nn.14, 16–26[2]), without even attempting to show when (*i.e.*, early or recently in the pandemic), or what distancing and sanitization protocols were observed (if any). To be sure, the first (and intentionally most sensational) example cited by the Governor from South Korea (Opp'n 20) is demonstrably inapposite. A "cluster" of COVID-19 infections originated with a church congregant around **February 18**, 2020, when there were **only 39 known cases in the country**.[3] The

[2] The Governor misrepresents *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984), for the proposition that the Court may consider his cited news articles. But *Flynt Distributing* only supports the admission of hearsay **affidavits**, **in support** of preliminary injunctive relief. *Id.* at 1394. The more apposite authority is *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010), holding, "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'"

[3] Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, *How a South Korean church helped fuel the spread of the coronarvirus*, The Washington Post (Mar. 25, 2020), https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/.

government did not deploy testing and closures until after the church cluster emerged.[4]

And the examples cited by the Governor which were actually studied by the CDC further illustrate the deficiency of the Governor's evidence. The oft-cited Seattle church choir (Opp'n 20) met on **March 17**—still ancient history on the COVID-19 timeline—for 2 1/2 hours of singing practice, which included "members sitting close to one another, sharing snacks, and stacking chairs at the end of practice."[5] Indeed, [m]embers had an **intense and prolonged exposure, singing while sitting 6–10 inches from one another**."[6] Moreover, one attendee "**was known to be symptomatic**."[7] At the time of the practice, "[t]here were no closures of schools, restaurants, churches, bowling alleys, banks, libraries, theaters, or any other businesses," and "[t]he advice from the State of Washington was to limit gatherings to 250 people."[8] And, with respect to singing, the CDC concluded only that "[t]he act of singing, itself, **might** have contributed to transmission."[9] The Arkansas example (Opp'n 20) occurred even earlier, **over three days**, March 6-8, which was eight days prior to the CDC's issuing social distancing guidelines, and included two people who were **symptomatic** and likely responsible for the subsequent spread.[10]

A repeat of such events this far into the pandemic is highly unlikely, especially where congregations like Plaintiffs' are observing sanitization and distancing. (V. Compl. ¶¶ 119–125.) In any event, the Governor's factually deficient, anecdotal accounts of far-flung church gatherings do not satisfy the constitutional standard. *See,*

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[4] *Id.*
[5] Lea Hamner, MPH, et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69(19) MMWR 606, 606 (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf.
[6] *Id.* at 609 (emphasis added).
[7] *Id.* at 606 (emphasis added).
[8] Skagit Valley Chorale, *Statement re: COVID-19*, skagitvalleychorale.org (Mar. 23, 2019), https://9b3c1cdb-8ac7-42d9-bccf-4c2d13847f41.filesusr.com/ugd/3e7440635a114fead240e1a02bc2c872a852de.pdf.
[9] Hamner, *supra* note 4, at 606 (emphasis added).
[10] *See* Allison James, DVM, PhD, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69(20) MMWR 632 (May 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf.

e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (alleged harm cannot be "mere speculation or conjecture").

C. The Governor's Discriminatory Application of the Stay-At-Home Orders Also Violates the First Amendment by Only Applying Certain Prohibitions to In-Home Bible Studies and Worship Services.

The Governor contends that Plaintiffs' challenge to his prohibition on in-home Bible studies, worship services, and life groups fails because his Stay-At-Home Order applies to everyone in California. (Opp'n 15–16). To support that contention, the Governor notes that the March 19 Stay-At-Home Order mandates that all residents of California remain in their homes unless engaging in one of the exempted activities, and refers to that Order as an "across-the-board" prohibition. (*Id.*). Balderdash. One need look no further than the 100,000 protesters gathered in Hollywood on June 7 (V. Compl. ¶ 112), the 15,000 people gathered in Oakland on June 1 (*Id.*, ¶ 115), or the thousands of other protesters who have gathered throughout California on numerous occasions—with praise and encouragement from the Governor—to see that the Governor's Orders in no way represent an "across-the-board prohibition." (Opp'n 16). Hundreds of thousands gathered outside of their homes without consequence or even a threat of consequence. Indeed, not only did the prohibition not apply to such protesters, but the Governor thanked them, wished God's blessings on them, and encouraged them to "**Keep doing it**." (V. Compl. ¶ 104 (emphasis added)). Discussing the exemption from his so-called "across-the-board prohibition," the Governor even noted that "people understand we have a Constitution, we have a right to free speech." (*Id.* ¶ 105). So, the Governor respects the Constitution as it relates to protesters and permits them to ignore the so-called "across-the-board prohibition" of any gathering outside the home, but apparently believes "people will understand" the Governor can ignore the Constitution when it comes to religious worship for small groups of people gathered in fellow Believers' homes. As Judge Ho aptly stated: "Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are

'open' and which remain 'closed.'" *Spell*, 962 F.3d at 181. Here, the Governor ignores that fundamental truth, and asks this Court to turn a blind eye to his astoundingly dichotomous treatment of religious worship services.

D. The Governor's Discriminatory Treatment of Plaintiffs' Singing and Chanting Violates the First Amendment.

Incredibly, the Governor starts his defense of his singing and chanting prohibition by claiming that Plaintiffs do not have standing to challenge it because they are located in counties where indoor worship is prohibited altogether. (Opp'n 10 n.8). Leaving aside the fact that relegating such an argument to a footnote constitutes a waiver of the argument, *see Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) (noting "[a]rguments raised only in footnotes . . . are generally deemed waived"), the argument is spurious. As Plaintiffs plainly allege and verify, Harvest International has 162 member churches throughout the State of California, including in counties not on the monitoring list subject to total prohibition. (V. Compl. ¶ 41). Moreover, mere days before the current ban was reinstituted, all of Plaintiffs' Churches were subject to the singing and chanting ban, and it could be reinstituted at any time. For this reason, Plaintiffs have challenged the ban as it has existed in the past, as it currently exists, and "any future modification, revision, or amendment to the Governor's Orders or similar legal directive." (V. Compl. at 71). Plaintiffs easily withstand the Governor's standing challenge.

The Governor's defense of the merits of the singing and chanting prohibition is a sea of red herrings. Interestingly, for the first time in any of his COVID-19 Orders, the Governor included a prohibition on protests **indoors** (where protests do not usually occur) in the July 13 Order[11] (Dkt. 1-13, V. Compl. Ex. M at 4); just before, he had issued his July 1 Worship Guidance containing a prohibition on all singing and chanting in worship, but then quickly issued his revised July 6 Worship Guidance

[11] Plaintiffs filed suit four days after the July 13 Order, negating the Governor's spurious charge that Plaintiffs sat on their rights. (Opp'n 2 24–25).

applying the singing and chanting ban only **indoors** (where worship usually occurs). (V. Compl. ¶¶ 87–93). Now, the Governor attempts to argue his obviously targeted prohibitions are universally applicable to all Californians. (Opp'n 16). But, as plainly demonstrated in the Verified Complaint (V. Compl. ¶¶ 112-118), every protest that the Governor praised and encouraged, despite their flagrant violations of his Orders, took place **outside**, as protests typically do, such that his ban on indoor protests is virtually meaningless. Conversely, his bans and severe restrictions on worship, and bans on worship singing and chanting—indoors, where worship typically occurs—are disproportionately restrictive. The Governor's apples-to-oranges comparison is a legal sham and an impermissible pretext for discrimination. *See Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 669 (7th Cir. 2013) (Hamilton, J., concurring) (noting the State's "late and *ad lib* attempt to come up with a viewpoint-neutral defense of [its] policy is further evidence that the defense is just a pretext for unconstitutional viewpoint discrimination"); *cf. First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020) ("[Churches appear] to be the only essential function whose core purpose—association for the purpose of worship—had been basically eliminated."). Indeed, in the context of a First Amendment challenge, the government's justification for its restrictions "has to be genuine, not a sham." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

The Governor also argues that his favored treatment for the chanting, shouting, and screaming of the protesters is permissible because Plaintiffs can simply go outside and sing all they want (Opp'n 16). But this also violates the Constitution. "The First Amendment is a shield that prohibits the state from interfering with a person's right to worship as he or she pleases." *ACLU of N.J. v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1481 (3d Cir. 1996). And, more pointedly, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Governor's attempt to prescribe where Plaintiffs may worship and the

manner in which they may do so is plainly unconstitutional.

II. THE GOVERNOR'S RELIANCE ON THE CENTURY-OLD *JACOBSON* PRECEDENT WITH NO FIRST AMENDMENT CONNECTION IS UTTERLY MISPLACED.

The Governor makes the dubious assertion that Plaintiffs "ignore" the Supreme Court's decision in *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), and astoundingly contends that this century-old precedent having nothing to do with the First Amendment wraps him in a blanket of immunity during times of emergency. (Opp'n 10). The Governor's reliance on *Jacobsen* is misplaced. In effect, the Governor contends that *Jacobson*'s statement that the government can place "manifold restraints" on its citizens during times of a pandemic, 197 U.S. at 26, constitutes the governing standard for First Amendment rights during COVID-19. Such is not the law. Indeed, it would be decades before the Supreme Court would hold the First Amendment's various clauses applicable to the states or even consider tiers of scrutiny in constitutional analysis. Not until 1940 (35 years later) did the Court first articulate the notion that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause); *see also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (incorporating the Establishment Clause).

Moreover, the term "compelling interest" was not introduced to First Amendment jurisprudence until over 50 years after *Jacobson*, in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 65 (1957), and strict scrutiny was not applied in its current form until 60 years after *Jacobson*, in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also* Stephen Siegel, *The Origins of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal History 355 (2008). Furthermore, in recent years there has been a monumental shift in how and when strict scrutiny is mandated in free speech cases. *See, e.g., Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D.

La. 2017) ("*Reed v. Town of Gilbert*[, 576 U.S. 155 (2015)] then **worked a sea change in First Amendment law**." (emphasis added)); *see also Wollschlaeger v. Florida*, 848 F.3d 1293, 1332 (11th Cir. 2017) (Tjoflat, J., dissenting) (same). *Jacobson* preceded all of these developments—the most recent by 110 years—and did not involve the First Amendment questions at issue here.

The Sixth Circuit in *Roberts* rightly rejected application of *Jacobson* as supplying a separate, permissive framework for evaluation of free exercise claims against continuing executive restrictions: "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Roberts*, 958 F.3d at 414-15; *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249, *8 (W.D. Ky. Apr. 11, 2020) ("[E]ven under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose."); *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-33-GFVT, 2020 WL 2305307, *4 (E.D. Ky. May 8, 2020) (same); *cf. Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313, *1 (E.D.N.C. May 16, 2020) ("There is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment"). This Court should reject *Jacobson* as a separate framework for evaluating Plaintiffs' constitutional claims.

Jacobson does not provide an alternative path to constitutionality for the Governor. Rather, *Jacobson* explained that, while governments can validly enact liberty-infringing restrictions (like the universal vaccine law at issue there) to stop the spread of diseases (like the Smallpox in Cambridge, Mass., at issue there), it cannot do so in "an arbitrary, unreasonable manner," or in a way that "go[es] so far beyond what was reasonably required for the safety of the public." *Jacobson*, 197 U.S. at 28. Thus, when evaluating challenges to laws "purporting to have been enacted to protect the public health, the public morals, or the public safety," courts must ask whether the law "has no real or *substantial* relation to those objects, *or* is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* (emphasis added).

Jacobson, then, is merely a precursor—not an alternative—to the strict scrutiny required of laws infringing Free Exercise rights as developed by the Supreme Court in the intervening century. *Cf. In re Abbott*, 954 F.3d 772, 790 (5th Cir. 2020) (concluding, in part, that courts considering Texas's COVID-19-related temporary restriction on elective abortions must ask whether it was "beyond all question" an undue burden under the contemporary undue burden test required by current Supreme Court precedent). The Governor's reliance on outdated and expansively reworked constitutional analysis should be rejected.

III. THE GOVERNOR'S DISCRIMINATORY APPLICATION OF HIS ORDERS DEMONSTRATES THAT THE ORDERS IMPERMISSIBLY VEST UNBRIDLED DISCRETION IN THE HANDS OF THE GOVERNOR IN VIOLATION OF THE FIRST AMENDMENT.

The Governor contends that, because he has not actually enforced his Orders against Plaintiffs' religious worship services, there can be no showing of a First Amendment violation. (Opp'n 16). The Governor's contention is utterly without merit and ignores the fact that the mere existence of his Orders is—itself—a constitutional violation, regardless of actual enforcement.[12] The First Amendment's hostility towards viewpoint and content discrimination is at its apex where, as here, the Governor is given unbridled discretion concerning the enforcement (or lack thereof) of his Orders. "When a city allows an official to ban [speech] in his unfettered control, it sanctions a device for suppression of free communication of ideas." *Saia v. People of State of N.Y.*, 334 U.S. 558, 562 (1948). The danger of viewpoint discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988). Indeed, "**the mere existence of the licensor's unfettered discretion, coupled**

[12] To be sure, enforcement is no longer hypothetical, as the Governor's Orders were enforced against a Ventura County church **today** by temporary restraining order, along with all present and future worshippers in an unprecedented order. *See* Order Granting Temporary Restraining Order and Order to Show Cause Re Issuance of Preliminary Injunction, *Cnty. of Ventura v. Godspeak Calvary Chapel*, No. 56-2020-00544086-CU-MC-VTA (Cal. Sup. Ct. Aug. 6, 2020) (attached as an exhibit hereto).

with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757 (emphasis added). This is precisely why "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth Cnty.*, 505 U.S. at 133.

Binding precedent from the Ninth Circuit also prohibits prior restraints vesting government officials with unbridled discretion. *See, e.g.*, *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) ("**A law cannot condition the free exercise of First Amendment rights on the unbridled discretion of government officials**." (cleaned up) (emphasis added)). And, there is little question that the Governor's Orders, which impose a total prohibition on Plaintiffs' religious worship services, constitute prior restraints. *See, e.g.*, *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981) (noting the "classic prior restraint cases" are those "in which speech is totally prohibited"); *see also Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 638 (4th Cir. 1999) (holding that total prohibitions "act[] as such a [prior] restraint"); *R.W.B. of Riverview, Inc. v. Stemple*, 111 F. Supp. 2d 748, 756 (S.D.W.V. 2000) ("total bans" are an unconstitutional prior restraint); *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1364 (M.D. Fla. 2000) ("This Court also finds that . . . moratoria are governed by prior restraint analysis in the same manners as permitting schemes."); *D'Ambra v. City of Providence*, 21 F. Supp. 2d 106, 113–14 (D.R.I. 1998) (moratorium on protected expression that includes no indication of ending is a complete prohibition and invalid prior restraint); *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102, 1108 (W.D. Wash. 2005) (total prohibitions on protected expression fail prior restraint analysis).

Here, there is no question that the Governor's Orders vest him with unbridled discretion to enforce or not enforce his Orders at his pleasure. Indeed, the Governor's discriminatory direction of his Orders against Plaintiffs' religious worship services while praising and encouraging hundreds of thousands of protesters demonstrates there is nothing to cabin his unrestrained discretion to apply or not apply his Orders as he

sees fit. The Governor's response admits this unbridled discretion. (Opp'n 17–18 (arguing that the Governor should not enforce his restrictions on mass protests, but notably omitting any **textual** restrictions on his ability to pick and choose when and if he applies his Orders to various other First Amendment activities).

"[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty.*, 505 U.S. at 133 n.10. And, his unbridled discretion is not merely theoretical; the Governor has actually exercised it to permit hundreds of thousands of protesters to gather in large settings in flagrant violation of his own Orders with no threat of enforcement (V. Compl. ¶¶ 112-118), and his Opposition asks this Court to accept his desire for carte blanche authority to choose when he decides to do so. (Opp'n 17–18). Yet, one day after massive protests occurred in the Governor's own city, he exercised his unfettered discretion to once again impose draconian restrictions (total prohibitions) on Plaintiffs' religious worship services. (V. Compl. ¶ 113). The entire scheme established by the Governor's Orders enshrines the precise "arbitrary application" the doctrine of unbridled discretion was intended to prevent. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 386 (4th Cir. 2006). Indeed, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). The Governor's Orders have instituted a total prohibition on Plaintiffs' religious worship services without any standards or objective criteria for why Plaintiffs' religious gatherings should be treated differently than the gathering of hundreds of thousands of protesters assembling together for secular speech activities. The First Amendment demands more, and so should this Court.

CONCLUSION

For the foregoing reasons, the preliminary injunction should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: *Harvest Rock Church, Inc. et. al. v. Newsom* Case No. 2:20-cv-6414JCG(KKx)

I hereby certify that on this 7th day of August, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of this State of California and the United States of America that the foregoing is true and correct and that this declaration was executed on August 7, 2020, at Lynchburg, Virginia.

Daniel J. Schmid
Declarant

/s/ Daniel J. Schmid
Signature