No. 20-55907

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

PLAINTIFFS–APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EMERGENY MOTION UNDER CIRCUIT RULE 27-3
RELIEF NEEDED BY SUNDAY, SEPTEMBER 20, 2020

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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 this September 16, 2020.

/s/ Roger K. Gannam

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Appellants, in support of their Emergency Motion for Injunction Pending Appeal (Dkt. 6-1, "IPA Motion"), reply to the Governor's Opposition to the IPA Motion (Dkt. 11-1, "Opposition").

ARGUMENT

I. APPELLANTS' IPA MOTION IS PROPERLY BEFORE THIS COURT.

Appellants complied with this Court's IPA rules and the district court's procedures. (Opp'n 7–8.) Appellants explained in detail their seeking an expedited IPA from the district court without further briefing (IPA Mot. iv–vi), **which the Governor assented to** because he agreed that the district court's denial of the PI and statements at the PI hearing made clear the court would deny the IPA quickly to enable Appellants to seek relief in this Court. (PI Hr'g Tr., Dkt. 11-2, at SER000222:17–224:11.) Moreover, Appellants listed the next available hearing date on the first page of their district court IPA motion as required by C.D. Cal. Civ. R. 7-4, but the body of the motion—to which the Governor assented—unequivocally requested an expedited decision, without further briefing, in accordance with the court's expressed preference to move the matter to this Court. (Dist. Ct. IPA Mot., Dkt. 11-2, at SER000187–189; PI Hr'g Tr., Dkt. 11-2, at SER000224:7–11.)

Today, the district court entered its promised order denying the IPA. (*See* Exhibit A attached hereto.) But Appellants were more than justified to seek the IPA from this Court, prior to the district court's ruling, after waiting for three weeks.

II. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE GOVERNOR HAS NOT CARRIED HIS BURDEN OF PROVING THE CONSTITUTIONALITY OF HIS ORDERS.

A. The Governor Has Not Presented Any Legitimate Evidence to Justify His Discriminatory Worship and Singing Bans.

It is the Governor's burden to prove the constitutionality of his Orders against Appellants' First Amendment challenge.[1] (IPA Mot. 18–19.) The Governor fails to carry his burden, and the Court should reject his attempts to shift the burden. (Opp'n 1, 6, 11–17, 20, 22, 24.)

1. The Governor adduces no evidence to justify his disparate treatment of religious and nonreligious activity for the same number of people in the same building.

The Governor (and the district court) glossed over the glaring disparity of the Orders that allow Appellants to provide nonreligious services in their buildings (feeding, sheltering, counseling, social services, and necessities of life) without numerical or singing restrictions but prohibits religious services in the same building with the same people. The Governor has no constitutional response to this blatant

[1] No deference is owed to the district court's legal and factual determinations. *See Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) ("A district court's determinations on mixed questions of law and fact that implicate constitutional rights are also reviewed *de novo*. Where, as here, the key issues arise under the First Amendment, we also conduct an independent review of the facts." (cleaned up)).

discrimination between permitted nonreligious services and banned religious services in the same churches with the same people. (Opp'n 18–19; IPA Mot. 9–14.)

Appellants plainly allege and verify that their ministries provide food, counseling, and other necessities of life to people in their communities, and that they do so at their churches. (V.Compl., Dkt. 6-5, ¶¶ 51, 55.) The Governor's Orders exempt **any gathering** where Appellants 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; at 90 (Ex. D); at 134 (Ex. G).) Thus, in **any** of Appellants' facilities, their people can assemble with unlimited others to provide food, shelter, and counseling, but cannot worship—preach a hopeful message, sing, or pray—with the same number of people in the same building. People can receive bread as a social service but not communion in a religious service; people can attend an unemployment counseling seminar but cannot attend a sermon. Appellants can shelter an unlimited number of people for hours in their churches but cannot gather with a single person to worship. The Governor cannot show—indeed has not adduced any evidence—that the risk of virus transmission among an unlimited number of people assembling for food (not pick and go grocery shopping), counseling, or other necessities of life, in the same building with no time limits, is somehow less than the risk among the same number of people assembling in the same building for a time-limited worship service.

The Governor cannot carry his burden of justifying his disparate exemptions for the same number of people in the same building—or many of the myriad exemptions for other activities involving large gatherings or assemblies of people (IPA Mot. 12–15)—because his supposed "evidence" is illusory. The Governor stakes his justification on the unsupported, *ipse dixit* statements of his expert (Opp'n 10–11, 17) and unverifiable reports of worship services becoming "super-spreader" events (Opp'n 2–3, 22, 24)—none of which is reliable or admissible. First, the Governor's 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*. (Opp'n 10–11, 17; Decl. James Watt, M.D., M.P.H., Dkt. 11-2, at SER000165–173.) 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 this Court to take judicial notice of numerous news reports of COVID-19 transmission purportedly connected to churches (Opp'n 2–3, 22, 24; Dkt. 11-2 at SER000026–27, nn.14, 16–26), submitted to the district court below without even attempting to show when (*i.e.*, early or

recently in the pandemic), or what distancing and sanitization protocols were observed (if any). (Dkt. 6-7 at 8–9.) But the purported truth of the matters asserted in the Governor's news submissions is not judicially noticeable. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). Moreover, the instances cited by the Governor which were actually studied by the CDC illustrate the deficiency of the Governor's evidence. For example, the oft-cited Seattle church choir (Dkt. 11-2 at SER000027) met on **March 17**—ancient history on the COVID-19 timeline—for 2 1/2 hours of "**intense and prolonged**" practice, "**sitting close to one another** [and] sharing snacks."[2] One attendee "**was known to be symptomatic**."[3] At the time of the practice, "[t]here were no closures," and "[t]he advice from the State of Washington was to limit gatherings to 250 people."[4] But, as for singing, the CDC concluded only that "[t]he act of singing, itself, **might** have contributed to transmission."[5]

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[2] 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.

[3] *Id.* at 606 (emphasis added).

[4] Skagit Valley Chorale, *Statement re: COVID-19*, skagitvalleychorale.org (Mar. 23, 2019), https://9b3c1cdb-8ac7-42d9-bccf-4c2d13847f41.filesusr.com/ugd/3e7440635a114fead240e1a02bc2c872a852de.pdf.

[5] Hamner, *supra* note 2, at 606 (emphasis added).

A repeat of such events this far into the pandemic is highly unlikely, especially where congregations like Appellants' are observing sanitization and distancing. (V.Compl. ¶¶ 119–125.) The Governor's factually deficient, anecdotal accounts of far-flung church gatherings do not satisfy the constitutional standard. *See, 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"); *see also Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-33-GFVT, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020) ("[E]vidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking.").

2. The Governor's own public statements are Appellants' evidence of discriminatory enforcement.

The Governor openly and publicly encouraged gatherings of hundreds of thousands of protesters, even as his Orders prohibited such gatherings. (V.Compl. ¶¶ 104–118.) On June 1, the Governor stated to protesters, "Thank you! God bless you. **Keep doing it**." (V.Compl. ¶ 104 (emphasis added)), and, "your rage is real. **Express it so that we can hear it**." (V.Compl. ¶ 109 (emphasis added)). These are express invitations to continue violating the Governor's Orders—closely analogous to the similar gubernatorial statements criticized in *Spell v. Edwards*, 962 F.3d 175

(5th Cir. 2020), and *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020). (IPA Mot. 6–9, 15; *cf.* Opp'n 12, 11–15.) The Governor treats religious worship differently without justification, and therefore violates the First Amendment.

B. No Ninth Circuit or Supreme Court Precedent Supports the Governor's Current Restrictions.

Neither this Court nor the Supreme Court has addressed Governor Newsom's July 13 Order prohibiting all indoor in-person worship in most of the state, or his July 6 Order banning all singing and chanting. (IPA Mot. 10.) Indeed, six months into the COVID-19 pandemic, the Governor's burden to justify his disparate restrictions on religious worship is higher. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360, at *2 (U.S. July 24, 2020) (Alito, J., dissenting) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.").

The Governor misrepresents Chief Justice Roberts' lone concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), as the *decision of the Court*, rather than the mere nonbinding "observations" of the Chief Justice

joined by no others and shedding no light on *the Court's* reasoning.[6] (Opp'n 17–18.) The concurrence focused primarily on the extraordinarily high standard for an interlocutory writ of injunction from the Supreme Court under 28 U.S.C. §1651. *See S. Bay*, 140 S. Ct. at 1613 ("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.'"). Here, by contrast, Appellants 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).

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), which relies heavily on the Sixth Circuit's decision in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (IPA Mot. 16–17), and in which Justice Kavanaugh explained convincingly why Governor Newsom's prior, more lenient restrictions "indisputably discriminate[] against religion, and such discrimination

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[6] *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting); *S. Bay*, 2020 WL 2813056, at *1 (Roberts, C.J., concurring); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 312 (3d Cir. 2013).

violates the First Amendment." 140 S. Ct. at 1615; *cf. S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 940–947 (9th Cir. 2020) (Collins, J., dissenting).

Furthermore, the Supreme Court's denial of a writ of injunction in *Elim Romanian Church v. Pritzker*, 207 L. Ed. 2d 157 (2020), challenging Illinois worship restrictions, provides even less support for Governor Newsom's *current* worship and singing bans. In *Elim Romanian*, the Supreme Court noted that the Illinois Governor removed all worship restrictions on the eve of the Court's emergency review, causing the Court to deny the extraordinary writ of injunction "without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant." 207 L. Ed. 2d 157. The eleventh-hour change of policy was the only rationale given.

Nor should this Court make the same obvious mistakes as the Seventh Circuit in its subsequent *Elim Romanian* decision on the merits of the preliminary injunction request, *see* 962 F.3d 341 (7th Cir. 2020) (cited in Opp'n at 18–19), placing the decision in direct conflict with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Lukumi* holds that a law restricting religious conduct "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree**" than the prohibited religious conduct. 508 U.S. at 543 (emphasis added). (IPA Mot 14.) The Seventh Circuit, however, expressly acknowledged "that warehouse workers and

people who assist the poor or elderly"—essential and always exempted from numerical gathering restrictions under Governor Newsom's Orders (V.Compl. ¶¶ 66–83)—"may be at much the same risk as people who gather for large, in-person religious worship." 962 F.3d at 347. Under *Lukumi*, this acknowledgement required the Seventh Circuit to find that the worship restrictions at issue were not generally applicable, and to hold them unconstitutional unless they could satisfy strict scrutiny. Compounding its error, the Seventh Circuit further violated the strict scrutiny principles of *Lukumi* by imposing its own value judgments on the importance of worship to the plaintiffs. As shown above, the court agreed that the Illinois numerical limitations exempted some nonreligious "Essential Activities" meeting material needs, but involving similar risks of COVID-19 spread as worship services, but the court nonetheless approved the disparate treatment because it assigned a lower value to spiritual needs than physical needs. *See* 962 F.3d at 347 ("Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways."). (*Cf.* Opp'n 23–24 "[T]he availability of alternatives such as outdoor, drive-in, or online services, suggest that any injury suffered is limited.").) But such line drawing based on a court's view of the value of a religious activity, rather than the comparative risk of the activity to the claimed governmental interest, is what the Free Exercise Clause forbids under *Lukumi*.

Finally, the Supreme Court's century-old decision in *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), does not provide an alternative constitutional standard to save the Governor's discriminatory restrictions. (Opp'n 20–22.) *Jacobson* was not a First Amendment case, and **predates by decades the development of modern strict scrutiny analysis**.[7] 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, 265 (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). 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)). *Jacobson* preceded all of these developments—the most recent by 110 years—and did not involve anything like the First Amendment questions at issue here.

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[7] *Jacobson* also predates by decades the incorporation of the First Amendment to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating Free Speech Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (incorporating Establishment Clause).

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; *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (same); *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."); *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 . . . .").

III. THE BALANCING OF EQUITIES FAVORS APPELLANTS.

Contrary to the Governor's assertions (Opp'n 23–24), the balancing of equities favors Appellants. They commenced suit just days after the Governor's July 6 and July 13 Orders (V.Compl., Dkt. 6-5), and diligently prosecuted both this appeal and their IPA motions to the district court and this Court (IPA Mot. iv–vi). Furthermore, Appellants established they can responsibly distance and sanitize their worship services (V.Compl. ¶¶ 119–125), which cannot be refuted by the Governor (*see supra* Part II.A.I).

CONCLUSION

For the foregoing reasons, and those in Appellants' IPA Motion, the IPA should issue.

DATED this September 16, 2020.

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DATED this September 16, 2020.

/s/ Roger K. Gannam
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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:

DATED this September 16, 2020.

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