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

OPENING BRIEF OF PLAINTIFFS–APPELLANTS

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DISCLOSURE STATEMENT

Plaintiffs–Appellants state that neither has a parent corporation and that no publicly held corporation owns any stock in either.

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) in this appeal from a district court order denying a preliminary injunction, entered September 2, 2020 (RE1, the "PI Order"). Plaintiffs–Appellants ("Harvest Churches") timely filed their notice of appeal on August 28, 2020 (RE144), the same day as the district court's *ore tenus* announcement that the preliminary injunction would be denied (Hr'g Tr., RE10), but before entry of the written PI Order, pursuant to Fed. R. App. P. 4(a)(2). The district court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

ISSUES PRESENTED FOR REVIEW

The issues presented to this Court are of grave importance to "the Nation's essential commitment to religious freedom," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), especially in the current times of pandemic and uncertainty. Both the Constitution and the Supreme Court have addressed these issues in absolute terms: "Neither a state nor the Federal Government can set up a church. . . . Neither can force nor influence **a person to go to or to remain away from a church against his will** . . . ." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added). There is no pandemic pause button or exception to the Constitution.

This case, challenging unconstitutional executive orders prohibiting or restricting religious worship, and this appeal from the denial of a preliminary injunction against those orders, have covered much ground in a short time. Governor Newsom's COVID-19 emergency declaration and ensuing orders remain in effect and are evolving, and Harvest Churches are either prohibited from worship inside their churches, or prohibited from singing inside their churches where worship is allowed under arbitrary capacity and numerical restrictions. Meanwhile, myriad businesses and nonreligious activities remain free of restrictions, and the Harvest Churches are permitted to freely use their church buildings for the Governor's approved, nonreligious purposes. And, until recently, the Governor has given mass protest gatherings of thousands *de facto*, absolute First Amendment exemptions from any gathering restrictions in his orders. Harvest Churches require preliminary injunctive relief from this Court to secure their rights to worship in their churches according to conscience and their sincerely held beliefs. These issues are presented for review:

Whether the district court erred in—

1. Denying Harvest Churches' motion for preliminary injunction;

2. Holding Harvest Churches are not likely to succeed on the merits of their claims that the Governor's orders violate their free exercise rights under the First Amendment;

3. Holding Harvest Churches are not likely to succeed on the merits of their claims that the Governor's orders violate their rights under Establishment Clause of the First Amendment; and

4. Holding Harvest Churches are not likely to succeed on the merits of their claims that the Governor's orders violate their rights of free speech and assembly under the First Amendment.

STATEMENT OF THE CASE

I. FACTS.

A. Harvest Churches and Their Religious Ministries.

Harvest Churches comprise Appellant Harvest Rock Church, Inc., a Christian church with multiple campuses in California, including in in Pasadena, Irvine, and Corona, and Appellant Harvest International Ministries, Inc., a Christian ministry organization based in Pasadena, with 162 member churches throughout California. (V. Compl., RE193–195 ¶¶ 40, 41, 48, 54.[1]) Each of the Harvest Churches has and exercises the sincere religious belief that its fundamental purpose is to worship God as an assembled body of believers, where the church ministers the Gospel of Jesus Christ to its congregants, and its congregants receive biblical instruction and minister

[1] "RE#" refers to the pages of Plaintiffs–Appellants' Excerpts of Record filed contemporaneously herewith.

to the needs of one another and the community. (V. Compl., RE194–197 ¶¶ 48, 49, 51, 54, 55, 57.)

Each of the Harvest Churches also has and exercises the sincere religious belief that it must order its worship and community support according to the commands and standards in the Bible. (V. Compl., RE195 ¶ 50, RE197 ¶ 58.) Regarding worship, the churches believe they must assemble for worship, in-person, as a critical requirement of both obedience to the Bible and fulfillment of the church's fundamental purpose, and to do so even more in times of peril and crisis. (V. Compl., RE194–198 ¶¶ 48–50, 54, 57, 58, 65.[2]) And worship includes, according to their sincerely held beliefs, singing and declaring aloud, together, their praise to God and reliance on Him. (V. Compl., RE197–198 ¶¶ 59–64.[3]) The churches also, in accordance with their sincerely held beliefs, meet in small groups hosted in members' homes to worship, study the Bible, fellowship, and minister to each other's needs. (V. Compl., RE195–197 ¶¶ 52, 53, 56.) The churches believe

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[2] Citing, e.g., *Hebrews* 10:25 ("**24** And let us consider how to stir up one another to love and good works, **25** not neglecting to meet together, as is the habit of some, but encouraging one another, and all the more as you see the Day drawing near." (ESV)).

[3] Citing, e.g., *Hebrews* 2:12 ("I will declare thy name unto my brethren, in the midst of the church will I sing praise unto thee." (KJV)); *Psalm* 59:16 ("I will sing aloud of your steadfast love in the morning. For you have been to me a fortress and a refuge in the day of my distress." (ESV)).

they cannot effectively obey the Bible and fulfill their religious purposes worshipping on the Internet. (V. Compl., RE__ ¶¶ 48, 54.)

Regarding service to their communities, each of the Harvest Churches has and exercises the sincere religious belief that the Bible commands churches to provide food, clothing, shelter, and counsel to the needy and afflicted. (V. Compl., RE194 ¶ 51, RE196 ¶ 55.) In accordance with these sincere beliefs, Harvest Rock Church operates a ministry at its church called the Hope Center, staffed by church leaders and volunteers, which provides support for those with financial, familial, emotional, and spiritual needs in its communities. (V. Compl., RE195 ¶ 51.) Many of Harvest International Ministries' member churches throughout California likewise have programs at their churches providing food support for the hungry, financial and ministry support for those in need, and biblical and social-service-type counseling for members of their communities. (V. Compl., RE196 ¶ 55.)

B. COVID-19 Restrictions and Exemptions Under Governor Newsom's Orders.

1. Evolution of restrictions and exemptions from the Emergency Proclamation to the Blueprint.

For nearly seven months, Governor Newsom and his designee, the California State Public Health Officer, have issued and amended a series of orders and guidances in response to COVID-19 (the "Orders"), extensively restricting when, where, and how Californians may exercise their liberties, including gathering for

religious worship according to conscience, while exempting myriad businesses and nonreligious activities from gathering restrictions. (V. Compl. RE199–209 ¶¶ 66–103; JS,[4] RE15–22.)

The Governor's COVID-19 scheme of restrictions and exemptions began with his **Emergency Proclamation**, issued March 4, 2020, proclaiming a "State of Emergency" in California due to COVID-19, which has no expiration by its own terms. (V. Compl. Ex. A, RE252.) Proceeding from the Emergency Proclamation, the Governor's Orders most relevant to this appeal are as follows:

- The March 12 **Executive Order N-25-20** states that all residents of California "are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures." (V. Compl. Ex. B, RE257.)

- The **March 19 Stay-at-Home Order**, issued by the State Public Health Officer at the Governor's direction, **orders** "all individuals living in the State of California to **stay home** or at their residence," but **exempts** travel for 16 expansive "federal critical infrastructure sectors" with **130 subsectors**, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and

[4] "JS" refers to the Joint Statement of Current COVID-Related Restrictions on Places of Worship in California filed in this Court on September 21, 2020 (Dkt. 22-1 to 22-13) in response to the Court's Order of September 17, 2020 (Dkt. 16), which is also included in Plaintiffs–Appellants' Excerpts of Record at RE14–143.

Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers (such as Wells Fargo and Chase centers), and (g) "radio, television, and media service" organizations (of any size), and numerous other exempted businesses and operations (of any size); but **does not exempt** travel to attend religious worship. (V. Compl. Ex. C, RE262 (emphasis added); V. Compl. Ex. D, RE263, V. Compl. Ex. E, RE274.) The March 19 Stay-at-Home Order does not impose any numerical or other limitations on people participating in the exempted activities, apart from advising that "they should at all times practice social distancing." (V. Compl. Ex. C, RE262.)

- The March 19 **Executive Order N-33-20** incorporates and puts the full power of the Governor's office behind the Stay-at-Home Order, directs the Governor's Office of Emergency Services "to take necessary steps to ensure compliance" with the order, and gives notice to the public that the order is enforceable pursuant to California Government Code § 8665, which provides that violating the Governor's orders is a misdemeanor criminal offense punishable by up to a $1,000 fine, six months in jail, or both. (V. Compl. Ex. E, RE274.)

- The April 28 **Essential Workforce Guidance**, prepared by the State Public Health Officer pursuant to Executive Order N-33-20, **exempts** from the Stay-at-Home Order an expanded 13 sectors and **173 subsectors** of businesses and operations in so-called "Essential Critical Infrastructure," similar to the "federal critical infrastructure sectors" adopted in the Stay-at-Home Order, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers (such as Wells Fargo and Chase centers), and (g) "radio, television, and media service" organizations (of any size), and new categories not covered in the Stay-at-Home Order, such as (h) "laundromats, laundry services, and dry cleaners," (i) law and accounting firms, real estate offices, and other professional services (of any size), (j) businesses that produce, store, transport and distribute cannabis, and (k) workers supporting California's entertainment industry, studios, and other related entertainment establishments, and numerous other exempted businesses and operations (of any size); and **exempts for the first time** "Clergy for essential support

and faith-based services," but **imposes** a unique qualifier on religious worship not applicable to other "Essential" services, limiting exempt "faith-based services" to those "that are **provided through streaming or other technologies** that support physical distancing and state public health guidelines." (V. Compl. Ex. G, RE289.)

- The **May 25 Worship Guidance**, pursuant to further executive and public health orders providing for the modification of stay-at-home restrictions, **authorizes the limited reopening** of places of worship for in-person religious worship at "25% of building capacity or a maximum of 100 attendees, whichever is lower," after "a county public health department's approval of religious services," but **imposes** a combination of significant mandatory and suggested restrictions on places of worship, including temperature screenings upon entering a church, eye-protection and gloves for workers, face coverings for employees, volunteers, and attendees, posting signage throughout the facility to inform attendees of the face covering and glove requirements, discouraging use of shared items such as Scriptures and Hymnals, discontinuing use of offering plates, discouraging handshakes or hugging of any kind, discontinuing singing, group recitation, and similar practices, and others. (V. Compl. Ex. H, RE312; V. Compl. Ex. J, RE320.)

- The revised **July 1 Worship Guidance** expressly **prohibits singing and chanting** in worship, and reimposes the indoor worship limitation of 25% of

building capacity or maximum of 100 people, whichever is lower. (V. Compl. Ex. K, RE333.)

- The revised **July 6 Worship Guidance** changed the singing and chanting prohibition to apply only indoors. (V. Compl. Ex. L, RE347.)

- On **July 13** the Governor **announced** the reinstatement of previously relaxed stay-at-home restrictions for the 30 counties on the California Department of Public Health (CDPH) County Monitoring List, which restrictions **banned in-person worship services** in those counties. (V. Compl., RE206–207 ¶¶ 94, 95.)

- The ensuing **July 13 Health Order** closed indoor operations throughout the state for certain non- "Essential Critical" businesses, and additionally specified the **closure of places of worship** and certain other businesses in counties on the County Monitoring List. (V. Compl. Ex. M, RE361.)

- The **July 29 Worship Guidance** continued the ban on indoor worship singing, and the numerical restriction for indoor worship of 25% of building capacity or 100 people, whichever is fewer. (JS Ex. C, RE33.) The July 29 Worship Guidance also repeats an acknowledgement, present in all preceding Worship Guidances:

> Precise **information about the number and rates of COVID-19 by industry or occupational groups, including among critical infrastructure workers, is not available at this time.** There have been **multiple outbreaks in a range of workplaces, indicating that workers are at risk** of acquiring or transmitting COVID-19 infection. Examples of **these workplaces include places of worship**, hospitals, long-term care facilities,

> prisons, **food production, warehouses, meat processing plants, and grocery stores**.

(JS Ex. C, RE34 (emphasis added); V. Compl., RE206 ¶ 93; *cf.* May 25 Worship Guidance, V. Compl. Ex. J, RE321 (same); July 1 Worship Guidance, V. Compl. Ex. K, RE334 (same); July 6 Worship Guidance, V. Compl. Ex. L, RE348 (same).)

- The **August 28 Health Order** authorizes the current scheme of COVID-19 restrictions in California, implemented on August 28 under the umbrella designation "Blueprint for a Safer Economy" (the "**Blueprint**"), which is a framework of risk tiers and sector-specific restrictions within each tier, applied and periodically adjusted, county-by-county, throughout the State.[5] (JS, RE15–16, RE18; JS Ex. H, RE90.) Counties may move in both directions within the Blueprint tier framework—from a more restrictive tier to a less restrictive tier, and back to a more restrictive tier again. (JS, RE15.) The Blueprint is administered through its online **Industry Guidance**[6] incorporating numerous sector-specific guidances. (JS, RE19.) The August 28 Health Order leaves in place all other statewide health orders

[5] The Blueprint tiers and corresponding sector restrictions as of September 21, 2020 are charted in the "**Blueprint Sector Chart**" (JS Ex.A, RE26.) Each county's tier classification as of September 15, along with population and other metrics, is shown in the "**Blueprint Data Chart**" (JS Ex.B, RE31.)

[6] *Cf. Industry guidance to reduce risk*, https://covid19.ca.gov/industry-guidance/ (last updated Oct. 1, 2020, 8:29 AM).

and guidances to the extent not expressly altered by the order, including the March 19 Stay-at-Home Order. (JS, RE18; JS Ex. H, RE90; V. Compl. Ex. G, RE294–295.)

2. Blueprint restrictions and exemptions on places of worship and other sectors.

a. Restrictions on places of worship.

Since the filing of Harvest Churches' Verified Complaint on July 17 (RE178), and the district court's preliminary injunction hearing on August 12, 2020 (Hr'g Tr., RE6), the adoption of the Blueprint scheme constitutes the only material changes to the COVID-19 restrictions and exemptions applicable to places of worship and other businesses and operations.[7] (JS, RE17.) As applied to the "Places of Worship" sector, which includes Harvest Churches, the Blueprint identifies specific restrictions for each tier:

- **Tier 1-Widespread:** No in-person, indoor worship allowed; only outdoor worship permitted.
- **Tier 2-Substantial:** Allowed to open indoors at maximum of 25% capacity or 100 people, whichever is fewer; outdoor worship permitted.
- **Tier 3-Moderate:** Allowed to open indoors at maximum of 50% capacity or 200 people, whichever is fewer; outdoor worship permitted.

[7] The July 29 Worship Guidance (JS Ex.C, RE33) replaced the July 6 Worship Guidance (V.Compl. Ex.L, RE347) in effect at the time of filing, but did not materially alter the prior guidance's provisions.

- **Tier 4-Minimal:** Allowed to open indoors at maximum of 50% capacity; outdoor worship permitted. (JS, RE15–16.)

The Blueprint tiers and sector-specific restrictions for Places of Worship under the August 28 Health Order supersede the July 13 Health Order (JS Ex. H, RE92), which prohibited indoor worship in counties on the County Monitoring List (32 when the Verified Complaint was filed) (V. Compl., RE206–207 ¶¶ 94–97). Counties not on the Monitoring List were subject only to the July 29 Worship Guidance. (JS, RE18.) In Tiers 2–4, where indoor worship is allowed, indoor singing and chanting are still prohibited under the July 29 Worship Guidance. (JS, RE16; JS Ex. C, RE45.)

The 30 counties classified as Tier 1–Widespread under the Blueprint as of September 15 include most of the counties that were on the now superseded County Monitoring List at the time the Verified Complaint was filed, including Los Angeles County where Appellant Harvest Rock Church's Los Angeles and Pasadena campuses are located, and Riverside County where its Corona campus is located.[8] (JS, RE18.) Orange County, where Harvest Rock Church's Irvine campus is located, was on the County Monitoring List at the time the Verified Complaint was filed, but as of September 15 was classified as Tier 2–Substantial under the Blueprint. (JS,

[8] Riverside County was subsequently moved to Tier 2. (Dkt. 24.)

RE19.) Appellant Harvest International Ministry, Inc. has 162 member churches located throughout California in various Blueprint tiers. (JS, RE19.)

b. Restrictions and exemptions for other sectors.

For sectors other than places of worship, the Blueprint modified some restrictions and exemptions as compared to prior Orders, but left others in place. (JS, RE19.) For example:

- **Grocery stores** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (V. Compl., RE202–203 ¶¶ 77–78; V. Compl. Ex. G, RE294), and are now classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the **July 29 Retail Guidance** (JS, RE19–20; JS Ex. I, RE93). Grocery stores could operate without capacity or numerical limit under the April 28 Essential Workforce Guidance (RE294), but the Blueprint permits grocery stores to operate at 50% capacity under Tier 1–Widespread and Tier 2–Substantial, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (JS, RE19–20.)

- **Essential retail** stores, such as Walmart and Costco, which are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (V. Compl., RE202–203 ¶¶ 77–78; V. Compl. Ex. G, RE294), are also now classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the July 29 Retail Guidance. (JS, RE20; JS Ex. I, RE93). Essential

retail stores could operate without capacity or numerical limit under the April 28 Essential Workforce Guidance (RE294), but the Blueprint permits essential retail stores to operate at 25% capacity under Tier 1, 50% capacity under Tier 2, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (JS, RE20.)

- **Laundromats** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (V. Compl., RE202–203 ¶¶ 77–78; V. Compl. Ex. G, RE311), and are now classified in the "Limited Services" sector of the Blueprint, subject to the Industry Guidance and **July 29 Limited Services Guidance** (JS, RE20–21; JS Ex. J, RE103). Both the April 28 Essential Workforce Guidance and the Blueprint allow laundromats to operate without numerical limits. (JS, RE20–21.)

- **Warehouses** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (V. Compl., RE202–203 ¶¶ 77–78; V. Compl. Ex. G, RE290, RE294, RE298, RE310), and are now classified in the "Logistics and warehousing facilities" sector of the Blueprint, subject to the Industry Guidance and **July 29 Logistics and Warehousing Guidance** (JS, RE21; JS Ex. K, RE122). Both the April 28 Essential Workforce Guidance and the Blueprint allow warehouses to operate without numerical limits. (JS, RE21.)

- **Food packing and processing** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (V. Compl., RE202–203 ¶¶ 77–78; V. Compl. Ex. G, RE294–295), and are now classified in the "Critical Infrastructure" sector of the Blueprint (JS Ex. A, RE26). Both the April 28 Essential Workforce Guidance and the Blueprint allow food packing and processing operations without numerical limits (JS Ex. A, RE26).

- The provision of "**food, shelter, and social services, and other necessities of life** for economically disadvantaged or otherwise needy individuals" is designated as "Essential Critical Infrastructure" under the April 28 Essential Workforce Guidance (V. Compl., RE202–203 ¶¶ 77–78; V. Compl. Ex. G, RE311), and is now classified in the "Critical Infrastructure" sector of the Blueprint (JS Ex. A, RE26). Both the April 28 Essential Workforce Guidance and the Blueprint allow such provision without numerical limits. (JS Ex. A, RE26). Furthermore, every version to date of the Worship Guidances exempts such activities, as well as schooling, from worship restrictions in the same church. (V. Compl. Ex. J, RE322 (excluding from worship restrictions "food preparation and service, delivery of items to those in need, . . . school and educational activities, . . . counseling, . . .and other activities that places and organizations of worship may provide"); V. Compl. Ex. K, RE335 (same); V. Compl. Ex. L, RE349 (same); JS Ex. C, RE35 (same).)

- Many **other sectors'** restrictions under the Blueprint are **less stringent** than those applicable to places of worship. For example:
    - Churches in Tier 2 may open for indoor worship at 25% capacity or 100 people, whichever is fewer. (JS, RE15.) By comparison, laundromats, warehouses, and meat packing plants in Tier 2 (or any tier) may operate with **no percentage or numerical caps** (JS, RE20–21; V. Compl. Ex. G, RE294–295); grocery and "essential" retail stores (e.g., Walmart, Costco, and 'big box' stores) in Tier 2 may operate at 50% capacity, but with **no numerical cap** (JS, RE19–20); museums in Tier 2 may operate at 25% capacity, but with **no numerical cap** (JS Ex. A, RE27); gyms and fitness centers in Tier 2 may operate at 10% capacity, but with **no numerical cap** (JS Ex. A, RE28).
    - Churches in Tier 3 may open for indoor worship at 50% capacity or 200 people, whichever is fewer. (JS, RE16.) By comparison, laundromats, warehouses, meat packing plants, and grocery and "essential" retail stores in Tier 3 may operate with **no percentage or numerical caps** (JS, RE19–20; V. Compl. Ex. G, RE294–295); museums in Tier 3 may operate at 50% capacity, but with **no numerical cap** (JS Ex. A, RE27); gyms and fitness centers in Tier 3 may operate at 25% capacity, but with **no numerical cap** (JS Ex. A, RE28); and cardrooms in Tier 3 may operate at 25% capacity, but with **no numerical cap** (JS Ex. A, RE30).

C. The Governor's Public Support for Mass Protest Gatherings That Violate His Orders.

From the end of May and into July, groups of thousands of people continually gathered throughout California cities for mass protests in violation of the stay-at-home restrictions of the Governor's Orders, without social distancing. (V. Compl., RE209–220 ¶¶ 104–118.) One such day of protests is depicted in the following photographs taken in Hollywood on Sunday, June 7:

(V. Compl., RE211–214 ¶ 112.)

Early in the protest period, on May 30, Governor Newsom released an official statement praising and encouraging the protesters in California to continue to gather in large numbers despite their flagrant violations of his own Orders. (V. Compl., RE210 ¶¶ 106–107.) Specifically, the Governor said, "we have seen **millions of people** lift up their voices in anger, rightfully outraged . . . . Every person who has

raised their voice should be heard." (*Id.*) He continued, "I want to thank all those . . . who exercised their right to protest peacefully."[9] (*Id.*)

On June 1, Governor Newsom held a news conference in which he expressed appreciation and gratitude for the thousands of protesters gathering in the streets in California in violation of his own orders. (V. Compl., RE209 ¶ 104.) In that press conference, the Governor thanked the protesters, invoked God's blessing on them, and explicitly encouraged the protesters to continue to flout his orders: "Those that want to express themselves and have, **Thank You! God bless You. Keep doing it**." (*Id.*)

When asked about the disparate treatment of family, religious, or social gatherings and the mass protests, Governor Newsom has issued public statements stating that "people understand we have a Constitution, we have a right to free speech

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[9] The news sources of the public protests and the Governor's quoted statements are verified by Harvest Churches' representative. (V.Compl., RE209–220 ¶¶ 104–118.) The Court may also take judicial notice of the news reports of the large public protests and the occurrences and contents of the Governor's public addresses. *See* Fed. R. Evid. 201(b); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 459 (9th Cir. 1995) (news report of fact "generally known" in jurisdiction and "capable of sufficiently accurate and ready determination"); *South La. Area Rate Cases v. Fed. Power Comm'n*, 428 F.2d 407, 438 n.98 (5th Cir. 1970) (sentiments expressed in speeches by public officials), and the content of the Governor's public statements, *see Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 263 (S.D.N.Y. 2019). The district court's contrary conclusion is in error. (PI Order, RE3–4, n.4.)

and we are all dealing with a moment in our Nation's history that is profound and pronounced," and issued further expressions of praise for the protesters flouting his orders. (V. Compl., RE209 ¶ 105.) In discussing the protesters' gathering by the thousands in the streets, Governor Newsom "expressed sympathy and showed support for the protesters," noting that he encouraged the protesters to engage in their constitutionally protected speech to advocate for their point because "people have lost patience" and need to protest. (V. Compl., RE210 ¶ 108.) Governor Newsom explicitly stated that he wants the mass protests to continue, despite his Orders, stating, "'your rage is real. **Express it so that we can hear it**.'" (V. Compl., RE210–211 ¶ 109.)

On June 5 the Governor called for new, more favorable treatment for mass protesters, stating, "'Protesters have the right not to be harassed . . . . Protesters have the right to protest peacefully. Protesters have the right to do so without being arrested . . . ." (V. Compl., RE211 ¶ 110.) The Governor has made no such calls for more favorable treatment for religious First Amendment activity, such as Harvest Churches' worship services.

D. Harvest Churches' Compliance with Social Distancing and Enhanced Sanitization Protocols.

Harvest Churches have complied, and are able and willing to continue complying, with social distancing and enhanced sanitization protocols to conduct safe worship services in their churches. (V. Compl., RE220–222 ¶¶ 119–125.) For

example, Harvest Rock Church's Pasadena campus seats 1,250 people, and it has been allowing for worship services only the number of people that allows for effective social distancing. (V. Compl., RE221 ¶ 120.) The church requires everyone to wear a mask into the building, takes the temperature of everyone entering the building, and spaces its attendees to achieve proper social distancing. (*Id.*) The church also has its building and restrooms professionally sanitized after hosting each worship service. (*Id.*)

Harvest Rock Church's Orange County campus seats 350 people, and it has been allowing for worship services only the number of people that allows for effective social distancing. (V. Compl., RE221 ¶ 121.) The church requires everyone to wear a mask into the building, takes the temperature of everyone entering the building, and spaces its attendees to achieve proper social distancing. (*Id.*) The church also has its building and restrooms professionally sanitized after hosting each worship service. (*Id.*)

Harvest Rock Church's Los Angeles campus seats 200 people, and it has been allowing for worship services only the number of people that allows for effective social distancing. (V. Compl., RE221 ¶ 122.) The church requires everyone to wear a mask into the building, takes the temperature of everyone entering the building, and spaces its attendees to achieve proper social distancing. (*Id.*) The church also

has its building and restrooms professionally sanitized after hosting each worship service. (*Id.*)

Harvest Rock Church's Corona campus seats 50 people, and it has been allowing for worship services only the number of people that allows for effective social distancing. (V. Compl., RE221–222 ¶ 123.) The church requires everyone to wear a mask into the building, takes the temperature of everyone entering the building, and spaces its attendees to achieve proper social distancing. (*Id.*) The church also has its building and restrooms professionally sanitized after hosting each worship service. (*Id.*)

The 162 member churches of Harvest International Ministries have also taken steps to engage in social distancing, limit the number of attendees, and perform enhanced sanitation protocols for its worship services. (V. Compl., RE222 ¶ 124.) Together, Harvest Churches are committed to protecting their members and attendees, and surrounding communities, while engaging in their constitutionally protected rights to exercise their sincerely held religious not to forsake the assembling of themselves together, and Harvest Churches are committed to engaging in appropriate social distancing and enhanced sanitation for all of their worship services. (V. Compl., RE222 ¶ 125.)

E. Enforcement of Governor's Orders Against Harvest Churches.

On August 11, 2020, the Pastor of Harvest Rock Church received a letter from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena threatening criminal penalties, including fines and imprisonment, for being open for worship against the Governor's Orders and local health orders. (Decl. Che Ahn (Aug. 11, 2020), RE153, RE155.) On August 18, 2020, the Pastor of Harvest Rock Church received a letter from the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatening criminal penalties against the church's staff and congregants, including fines and imprisonment, and even closure of the church, for being open for worship against the Governor's Orders and local health orders. (Decl. Che Ahn (Aug. 21, 2020), RE149, RE151.)

II. PROCEDURAL HISTORY.

A. District Court Proceedings and Order on Appeal.

Harvest Churches commenced this action on July 17, 2020, four days after the July 13 Health Order closed churches for indoor worship in most of California. (V. Compl., RE178; V. Compl. Ex. M, RE361.) Harvest Churches challenge the Governor' Orders as violating their free exercise, assembly, free speech, and Establishment Clause rights under the First Amendment, their equal protection rights under the Fourteenth Amendment, and their Guarantee Clause rights under Article

IV, Section 4 of the Constitution. (V. Compl., RE229–246 ¶¶ 155–265.) At the same time, Harvest Churches pressed their free exercise, assembly, free speech, and Establishment Clause claims in a motion for temporary restraining order (TRO) and preliminary injunction, seeking to protect their upcoming Sunday worship services on July 19. (Dist. Ct. Dkt. 4.) The district court denied the TRO on Monday, July 20 (Dist. Ct. Dkt. 5), and convened a hearing on the preliminary injunction over three weeks later, on August 12. (Hr'g Tr., RE6.) The district court announced its denial of the preliminary injunction at the hearing (Hr'g Tr., RE10), and entered its written order denying the preliminary injunction on September 2 (RE1, the "PI Order"), holding that Harvest Churches were unlikely to prevail on the merits of their First Amendment claims. Harvest Churches filed their notice of appeal from the PI Order on August 28 (RE144), in between the district court's announcement and written order of denial.

B. IPA Proceedings in This Court.

Harvest Church moved for an injunction pending appeal (IPA), first in the district court (Dist. Ct. Dkt. 44) and then in this Court (Dkt. 6-1 to 6-11). The Court entered an Order on September 17 (Dkt. 16) setting argument on the IPA motion for September 21, and directing the parties to file a joint statement answering two questions regarding the changes in COVID-related restrictions applicable to places of worship since the filing of the Verified Complaint and the preliminary injunction

hearing in the district court. On September 21 the parties filed their Joint Statement as directed (Dkt. 22-1 to 22-13), and the Court held argument on the IPA motion. On October 1, 2020, the Court entered an order denying Harvest Churches' IPA motion based on a 2–1 decision, with Judge O'Scannlain dissenting. *See Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020).

SUMMARY OF THE ARGUMENT

Harvest Churches are entitled to a preliminary injunction against enforcement of the Governor's Orders because the Orders violate Harvest Churches' free exercise rights under the First Amendment by discriminatorily treating their religious worship services differently from myriad similarly situated non-religious gatherings, by discriminating between Harvest Churches' social and charitable activities and religious worship activities in the same building, and by the Governor's individualized, *de facto* exemption from his Orders for mass protests. The Orders also violate Harvest Churches' Establishment Clause rights by their official hostility to Harvest Churches' religious exercise, and restrict Harvest Churches' free speech and assembly on the basis of content in violation of the First Amendment. Harvest Churches' First Amendment claims trigger strict scrutiny, which the Orders cannot survive.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion, and any underlying factual findings for clear error. *See Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017). "'The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law.'" *Cuviello v. City of Vallejo*, 944 F.3d 816, 825–26 (9th Cir. 2019) (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)).

To obtain a preliminary injunction, Harvest Churches must show they are likely to succeed on the merits, they are likely to suffer irreparable harm absent preliminary relief, and that the balance of equities and public interest favor an injunction. *See Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012). However, "[p]reliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020). Moreover, "when seeking a preliminary injunction in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Sanders Cnty. Republican Cent. Comm.*, 698 F.3d at 744 (cleaned up).

ARGUMENT

I. HARVEST CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE EXERCISE CLAIMS.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) [hereinafter *Lukumi*], the Supreme Court held certain laws prohibiting religious practices violated the First Amendment, concluding "that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." 508 U.S. at 524. The same can be said of Governor Newsom's Orders, which establish a scheme of gathering restrictions and exemptions that permit Harvest Churches to assemble an unlimited number of people in their church to provide and receive food, clothing, shelter, and counsel—as nonreligious social services—but prohibit religious preaching, communion, or other worship in the same church with the same people. Moreover, the scheme of restrictions and exemptions permit working, shopping, and patronizing myriad businesses and nonreligious activities involving groups and crowds of people, with no numerical limits, while prohibiting religious worship services of any size. Furthermore, the Governor has publicly commended and encouraged mass protest gatherings by the thousands in violation of his Orders, granting a *de facto* exemption for the mass protests. Thus, **the Orders discriminate between religious and nonreligious activities among similar groups of people, and even religious and**

nonreligious services in the same church with the same people. The disparate treatment (at best) or targeting (at worst) of religion and religious exercise could not be clearer.

A. The Orders' Internal Discrimination Between Harvest Churches' *Permissible* Nonreligious Services and *Impermissible* Religious Worship Violates the First Amendment.

As shown above,[10] the March 19 Stay-at-Home Order adopted, and the April 28 Essential Workforce Order expanded further, dozens of categories and subcategories of businesses and activities wholly exempt from stay-at-home requirements, subject only to recommended social distancing. (V. Compl. Ex. C, RE262; V. Compl. Ex. D, RE263; V. Compl. Ex. E, RE274; V. Compl. Ex. G, RE289.) These activities include the provision of "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals," which maintain their exemption in all tiers under the Blueprint. (V. Compl. Ex. D, RE267; V. Compl. Ex. G, RE311; JS Ex. A, RE26.) Thus, under the Governor's Orders, Harvest Churches may provide food for the hungry, shelter for the homeless, unemployment, family, or drug counseling, and any other social services for the "necessities of life," and **may do so in their church buildings, without numerical restrictions on workers or recipients.**

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[10] Facts, *supra*, Part I.B.

But, in Tier 2 counties where Harvest Churches are permitted to have indoor worship, if they are legally feeding, clothing, housing, or counseling, or otherwise providing "necessities of life" for 101 people (or more than 25% of building capacity) and at any point transition from providing the approved "necessities of life" to providing spiritual necessities of life through worship—**for the same people, in the same building—**the Governor's Orders automatically apply, and Harvest Churches are subject to criminal penalties. (V. Compl., RE204–206 ¶¶ 84–92, RE208 ¶ 101.) And, for Harvest Churches in Tier 1 counties totally closed for indoor worship, they are still exempt for feeding, counseling, and even housing overnight an unlimited number of materially needy people in the same room, but if a pastor preaches a sermon for the spiritually needy among them and invites them to participate by singing a hymn, the exempt social service becomes a prohibited religious worship service subject to criminal penalties—no matter how many or how few participate in worship. (V. Compl., RE206–207 ¶¶ 94–97.)

The Governor's Orders and their classifications of exempt activities has established a system of disparate treatment between material social services and religious worship services offered in the same building to the same people. This disparate treatment, prohibiting and restricting Harvest Churches' religious worship services, substantially burdens Harvest Churches' exercise of religion according to their sincerely held beliefs and violates the First Amendment.

B. The Orders' External Discrimination Between Harvest Churches' Prohibited or Restricted Religious Worship and the Myriad Exempt Businesses and Nonreligious Activities Involving Crowds and Masses of People Violates the First Amendment.

1. The Orders' exemption of a multitude of businesses and nonreligious activities involving crowds while threatening criminal sanctions against Harvest Churches for hosting worship services violates the First Amendment.

As shown above (*see supra* Facts, Part I.B.2.b), while religious worship is either prohibited or severely restricted under the Blueprint tiers, grocery stores, 'big box' retail stores like Walmart and Costco, warehouse home stores like Lowes and Home Depot, laundromats, warehouses, food processing plants, school, museums, cardrooms, and numerous other businesses and nonreligious activities involving crowds or masses of people are allowed to operate without numerical restrictions, or with numerical restrictions that are less stringent than the restrictions applied to places of worship. The Orders' disparate treatment of places of worship as compared to the myriad exempt businesses and activities unquestionably and substantially burdens Harvest Churches' exercise of religion and violates the First Amendment.

2. The Governor's *de facto* exemption for protesters' gathering by the thousands in violation of his Orders while the Orders threaten criminal sanctions against Harvest Churches for hosting worship services violates the First Amendment.

As shown above (*see supra* Facts, Part I.C), Governor Newsom has not only refused to enforce his COVID-19 stay-at-home restrictions upon the thousands of protesters gathering in violation of his Orders, he has openly encouraged their protests. (V. Compl., RE209–220 ¶¶ 104–118.) The constitutional problem with the Governor's encouragement of mass protesters while restricting worshippers was highlighted by Judge Ho's concurrence in *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020), where the court dismissed as moot an appeal arising from a church's challenge to Louisiana's stay-at-home orders restricting worship services to 10 people. 962 F.3d at 177. Judge Ho first recounted,

> At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest.

Id. at 180–81 (Ho., J., concurring). Then, he observed, "But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them . . . ." *Id.* at 181.

> 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."

Id. (emphasis added).

Judge Ho continued, "It is common knowledge, and easily proved, that protesters do not comply with social distancing requirements. But instead of enforcing the Governor's orders, officials are encouraging the protests—out of an admirable, if belated, respect for First Amendment rights." *Id.* He concluded, "**If protests are exempt from social distancing requirements, then worship must be too.**" *Id.* (emphasis added). "**[P]ublic officials cannot devalue people of faith while elevating certain protesters**. **That would offend the First Amendment—not to mention the principle of equality for which the protests stand**." *Id.* at 183 (emphasis added).

Similarly, as recounted in *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020), the Governor of New York and the New York City Mayor openly encouraged protesters gathering in large numbers in New York, 2020 WL 3488742, *4–5, while continuing to prohibit in-person religious gatherings. *Id.* at *5-6. The court issued a preliminary injunction enjoining the enforcement of the "ever changing maximum number of people" for religious worship because the disparate treatment for protesters as compared to religious

congregants in a worship service violated the First Amendment. *Id.*, at *8 ("[I]t is plain to this court that the broad limits of that executive latitude have been exceeded."). The court found that a restriction of 25% capacity for indoor worship services that is not applied to protesters removes the law from generally applicability and thus mandates strict scrutiny. *Id.* at *11.

With respect to openly supporting protesters while imposing draconian restrictions on indoor religious worship services, the court noted that "Mayor de Blasio's simultaneous pro-protest/anti-religious gatherings message . . . clearly undermines the legitimacy of the proffered reason for what seems to be a clear exemption, no matter the reason." *Id.* at *12. Indeed, "**by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of special treatment.**" *Id.* at *12 (emphasis added). The court held the government's disparate treatment of protesters and religious gatherings violated the Free Exercise Clause and issued a preliminary injunction. *Id.* at *13.

The same result should obtain here. Governor Newsom's Orders impose disparately onerous prohibitions and numerical restrictions on religious gatherings in churches, and even on in-home Bible studies, worship meetings, and life groups. (V. Compl., RE194–197 ¶¶ 48–58, RE200–201 ¶ 73, RE204–206 ¶¶ 83–94.) Moreover, the Orders purport to dictate the manner in which Harvest Churches may engage in acceptable religious worship by prohibiting singing and chanting where

indoor worship is allowed, and by allowing provision and receipt of approved social services by unlimited numbers in the same church buildings where religious worship services are limited numerically or prohibited altogether. (V. Compl., RE200–201 ¶¶ 71–73, RE203–204 ¶ 78, RE207–209 ¶¶ 98–103.) And the Governor has imposed these draconian restrictions on Harvest Churches while openly celebrating and encouraging mass protest gatherings. (V. Compl., RE209–211 ¶¶ 104–111.) The Constitution demands more and so should this Court.

C. The Orders Are Subject to Strict Scrutiny Under *Lukumi* Because They Substantially Burden Harvest Churches' Religious Exercise and Are Neither Neutral nor Generally Applicable.

The Governor's Orders and their application against Harvest Churches' religious practices must be subjected to strict scrutiny under the First Amendment because they substantially burden Harvest Churches' religious exercise and are not neutral or generally applicable, and therefore "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32.

1. The Governor's Orders substantially burden Harvest Churches' exercise of religion.

Harvest Churches have and exercise sincere religious beliefs, rooted in biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so even more in times of peril and crisis.

(V. Compl., RE194–196 ¶¶ 48–54, RE197–198 ¶¶ 57–58, 65.) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249, at *8 (W.D. Ky. Apr. 11, 2020) [hereinafter, *On Fire*] (cleaned up) (emphasis added). And Harvest Churches also have and exercise sincere beliefs that obedience to Scripture requires them to sing as, and in, their worship of God. (V. Compl., RE097–198 ¶¶ 59–64.) Though the Governor might not view church worship services and singing as fundamental to Harvest Churches' religious exercise—or "Essential Critical" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Governor's Orders prohibiting or restricting Harvest Churches' religious worship services inside their churches, and prohibiting singing and chanting even where limited worship is allowed, on pain of criminal sanctions, unquestionably and substantially burdens Harvest Churches' exercise of religion according to their sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added).

2. The Orders fail neutrality and general applicability because prohibited worship is not more dangerous than permitted social services at the same church, or permitted working or shopping in 'big box' or warehouse stores.

A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 533–34 (cleaned up). The First Amendment prohibits hostility that is "masked, as well as overt." *Id.* The Governor's orders are not facially neutral, but even if so, they covertly or subtly depart from neutrality by treating Harvest Churches' religious gatherings differently from nonreligious gatherings.

The orders fail neutrality and general applicability on facial examination because they expressly ban or severely restrict the numbers and conduct at religious worship gatherings (capacity limits and singing prohibition), while expressly exempting a multitude of business and nonreligious activities involving crowds that are no less risky (*e.g.*, shopping or working at 'big box' and warehouse stores). (V. Compl., RE199–207 ¶¶ 66–97.) Exempted gatherings are permitted subject only to distancing advice, but religious worship is prohibited or severely restricted even if distancing and hygiene guidelines are followed religiously. Moreover, while **a church can gather at its own facility with no numerical limit to provide**

nonreligious, social services approved by the Governor (*e.g.*, food, shelter, counseling, etc.), **his Orders prohibit the same church from conducting a religious worship service in its own facility under the same conditions, if at all.** (V. Compl., RE207–209 ¶¶ 98–103.) "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or **regulates or prohibits conduct because it is undertaken for religious reasons**." *Lukumi*, 508 U.S. at 532 (emphasis added). Prohibiting Californians from joining others at a church for religious reasons, such as a worship service, while permitting them to join others at the same church for nonreligious reasons, such as giving or receiving food, shelter, or counseling, "**violat[es] the Free Exercise Clause beyond all question**." *On Fire*, 2020 WL 1820249, at *6 (emphasis added).

Nor are the orders generally applicable on their face, for many of the same reasons they are not neutral. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. To determine general applicability, courts focus on disparate treatment of similar conduct. *Lukumi*, 508 U.S. at 542. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* A law is not generally applicable where "inequality results" from the government's "decid[ing] that the governmental interests it seeks to advance are worthy of being

pursued only against conduct with religious motivation." *Id.* at 543. Thus, a law "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

The Governor is unable to demonstrate the difference in risk of spreading COVID-19, if any, as between a congregant who spends an hour at a socially-distanced worship service with a limited number of people (because of distancing), which is prohibited, and a shopper who spends an hour in a 'big box' or warehouse store with unlimited other shoppers, which is allowed—the Governor certainly cannot demonstrate the worship service is riskier. Nor can the Governor demonstrate Harvest Churches' socially-distanced worship services, standing in place for an hour or so at a time, once per week on a Sunday are riskier than any Walmart or Trader Joe's, working dozens of moving and stationary employees together for hours at a time, cycling hundreds or thousands of roving customers through the building, with no shopping time limit—touching carts, touching shelves, removing items from shelves and replacing them, following and passing within 6 feet of other customers, giving money to and receiving change from cashiers, touching point-of-sale machines—all day, 7 days a week. To be sure, **dozens, hundreds, or more employees can work at one time for one "Essential" business—*e.g.*, Amazon**

warehouses, Home Depots, Wells Fargo processing centers, etc.—in one building, for 8, 10, 12 or more hours at a time, 5, 6, or 7 days a week, subject only to the orders' social distancing guidance. Neither logic nor common experience allows the conclusion that socially-distanced worship services pose more risk than the myriad "Essential Critical" businesses and activities that are exempt from numerical limit under the Orders. To be sure, the Governor's Worship Guidances all expressly equate the COVID-19 risks at places of worship with the risks at "Essential Critical" businesses and nonreligious operations such as "food production, warehouses, meat processing plants, and grocery stores," which are exempt from the unique numerical restrictions and other prohibitions imposed on the core activities of places of religious worship. (*See supra* Facts, Part I.B.1.)

3. The Orders fail neutrality and general applicability because of the Governor's selective enforcement.

The orders also fail neutrality and general applicability as actually enforced, because the Governor has not applied the orders neutrally or generally. While Harvest Churches are threatened with criminal punishment for increasingly restrictive prohibitions on religious gathering, even singing, the Governor openly and publicly declared a *de facto* exemption for mass protest gatherings which clearly violate his Orders but nonetheless have his unequivocal support. (V. Compl., RE209–220 ¶¶ 104–118.) It is difficult to imagine a more selective and less neutral

application of the Governor's Orders. *See Soos*, *supra* Part I.B.2; *see also Spell*, 962 F.3d at 181 (Ho., J., concurring) ("If officials are now exempting protesters, how can they justify continuing to restrict worshippers? The answer is that they can't.")

D. Substantial Precedent Arising From COVID-19 Challenges Holds That Worship Prohibitions Like the Governor's Orders Are Subject to Strict Scrutiny and Cannot Satisfy It.

1. *Roberts*, *Maryville*, *First Pentecostal Church*, and *Berean Baptist.*

Twice in two weeks the Sixth Circuit enjoined enforcement of executive orders like the Governor's Orders, determining that restrictions on drive-in and in-person worship services violated the First Amendment. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (in-person worship services); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (holding plaintiffs likely to succeed on merits of First Amendment claims for both drive-in and in-person services). Also, in *First Pentecostal Church v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020), the Fifth Circuit granted an IPA to a Mississippi church, enjoining enforcement of that State's orders.

In *Roberts*, the Sixth Circuit granted an IPA enjoining the Kentucky Governor from enforcing executive orders prohibiting a church's in-person worship services when "serial exemptions for secular activities pose comparable public health risks." 958 F.3d at 414. In determining the plaintiffs' likely success on the merits of their free exercise claims, the court recognized, "On one side of the line, a generally

applicable law that incidentally burdens religious practice usually will be upheld." *Id.* at 413 (citing *Emp't Div. v. Smith*, 494 U.S. 872, 879–79 (1990)). But, the court concluded the Kentucky orders "likely fall on the prohibited side of the line," where "a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'" *Id.* (quoting *Lukumi*, 508 U.S. at 553).

> **Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so.** As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. **At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.**

Id. at 413–14 (cleaned up) (emphasis added).

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers." *Id.* at 414. Thus, the court rejected the Governor's suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport," *id.* at 416, and further explained,

> the reason a group of people go to one place has nothing to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, **why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.**

Id. (emphasis added).

The *Roberts* court also rejected the notion that the Governor's orders were justified because congregants could simply worship online via Facebook, reasoning,

> Who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25.
>
> [T]he Free Exercise Clause does not protect sympathetic religious practices alone. And that's exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it.

Id. at 415 (citation omitted).

In awarding the injunction, the *Roberts* court brought into sharp relief the Kentucky Governor's disparate treatment of churchgoers under his orders:

> Keep in mind that the Church and its congregants just want to be treated equally. . . . They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . . **The Governor has offered no good reason for refusing to trust the congregants who**

> **promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same**.
>
> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

Id. at 414 (emphasis added).

A week after the Sixth Circuit's *Roberts* decision, the Eastern District of North Carolina issued a TRO enjoining the North Carolina Governor from enforcing a 10-person limit on religious worship because it violated the Free Exercise Clause. *See Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313 (E.D.N.C. May 16, 2020) [hereinafter *Berean Baptist*]. In granting the TRO, the court noted upfront, "**There is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment**." 2020 WL 2514313, at *1 (emphasis added). The North Carolina "stay-at-home" orders challenged in *Berean Baptist* provided exemptions from their 10-person gathering limits for numerous "Essential Business and Operations." *Id.* at *3. But, the North Carolina orders subjected worship services to a 10-person limit that was not imposed on any of the myriad "Essential" businesses and activities. 2020 WL 2514313, at *4. The *Berean Baptist* court observed that the uniquely restrictive 10-person limit for

worship gatherings "represent[s] precisely the sort of 'subtle departures from neutrality' that the Free Exercise Clause is designed to prevent." *Id.* at *6 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

The court observed further,

> Eleven men and women can stand side by side working indoors Monday through Friday at a hospital, at a plant, or at a package distribution center and be trusted to follow social distancing and hygiene guidance, but those same eleven men and women cannot be trusted to do the same when they worship inside together on Saturday or Sunday. "The distinction defies explanation . . . ."

Id. at *8 (quoting *Roberts*, 958 F.3d at 414).

Thus, the court concluded, "These **glaring inconsistencies** between the treatment of religious entities and individuals and nonreligious entities and individuals take [the orders] outside the 'safe harbor for generally applicable laws.'" *Id.* (quoting *Roberts*, 958 F.3d at 413). Ultimately, in concluding the North Carolina orders could not pass strict scrutiny, the *Berean Baptist* court recognized that the plaintiffs "simply want the Governor to afford them the same treatment as they and their fellow nonreligious citizens receive when they work at a plant, clean an office, ride a bus, shop at a store, or mourn someone they love at a funeral." *Id.* at *9 (citing *Lukumi*, 508 U.S. at 546 ("The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.")).

2. Several other courts have granted similar injunctions against prohibitions on religious gatherings.

In Louisville, Kentucky, the government threatened to use police to impose criminal sanctions on individuals who went to church on Easter in violation of similar COVID-19 orders. The Western District of Kentucky held that the mere threat of such criminal sanctions warranted a TRO, enjoining the Mayor of Louisville from "enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on drive-in church services at On Fire." See *On Fire*, 2020 WL 1820249, at *1.

The District of Kansas issued a TRO enjoining enforcement of a restriction on religious gatherings of more than 10 people, requiring the state to treat worship services the same as exempted "essential" gatherings. *See First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, *6–7 (D. Kan. Apr. 18, 2020) [hereinafter *First Baptist*]. The *First Baptist* TRO specifically stated that the government's disparate treatment of religious gatherings violated the Free Exercise Clause because it showed "**religious activities were specifically targeted for more onerous restrictions than comparable secular activities**." *Id.* at *7 (emphasis added). The court concluded that restricting religious gatherings while permitting other nonreligious activities "show[s] that these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral." *Id.*

Indeed, "it goes without saying that the government **could not lawfully expressly prohibit individuals from meeting together for religious services**." *Id.* at *6 (emphasis added).

The Eastern District of Kentucky issued a statewide TRO enjoining the Kentucky Governor from enforcing his prohibition on in-person religious gatherings. *See Tabernacle Baptist Church, Inc. of Nicholasville, Ky. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307, *1, 6 (W.D. Ky. May 8, 2020). The court observed that the First Amendment does not "mean something different because society is desperate for a cure or prescription," *id.* at *1, and that "'**even under *Jacobson*** [*v. Massachusetts*, 197 U.S. 11 (1905)], **constitutional rights still exist**.'" *Id.* at *4 (quoting *On Fire*, 2020 WL 1820248, *15 (emphasis added)). In fact, "while courts should refrain from second-guessing the efficacy of a state's chosen protective measures," a government very well may "'go so far beyond what was reasonably required for the safety of the public, as to authorize or **compel the courts to interfere**.'" *Tabernacle*, 2020 WL 2305307, at *4 (quoting *Jacobson*, 197 U.S. at 28 (emphasis added)).

> It follows that the prohibition on **in-person** services should be enjoined . . . . There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services,**

> **which, unlike the foregoing, *benefit from constitutional protection***.

Tabernacle, 2020 WL 2305307, at *5 (emphasis added).

E. The Orders Cannot Withstand Strict Scrutiny.

Because the Governor's discriminatory Orders trigger strict scrutiny under the First Amendment (*see supra* Parts I.C, D), the Governor is subject to "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . ."). This is not that rare case.

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire*, 2020 WL 1820249, at *7. But where the Governor permits tens of thousands of protesters to gather without numerical limitation all across California, the government's assertions of a compelling interest are substantially diminished. Put simply, the Governor's orders "cannot be regarded as protecting an interest of the highest order . . . **when [they] leave[] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added).

Whatever interest the Governor claims, however, he cannot show the orders and their enforcement are narrowly tailored to be the least restrictive means of protecting that interest. And it is the Governor's burden to make the showing because

"the 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, **[Harvest Churches] 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).

To meet this burden, the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). And the Governor cannot meet the burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added). Furthermore, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "There must be a fit between the . . . ends and the means

chosen to accomplish those ends." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011) (cleaned up).

The Governor fails this test. The Governor has prohibited and severely restricted Harvest Churches' and others' religious worship services, while expansively exempting myriad "Essential Critical" businesses and nonreligious activities involving crowds of people, and openly supporting thousands of protesters continually gathering in blatant disregard of his orders. (V. Compl., RE199–207 ¶¶ 68–97, RE209–220 ¶¶ 104–118.) The Governor has not and cannot state why or how crowds and masses of thousands of protesters are any less "dangerous" to public health than a responsibly distanced and sanitized worship service, yet the Governor *de facto* exempted the protesters and prohibited Harvest Churches' worship services. As Judge Ho said in his *Spell* concurrence, the Governor's decision "has consequences," 962 F.3d at 183, and the consequence here is that Governor Newsom's orders fail strict scrutiny and violate the First Amendment.

Examples abound of less restrictive approaches that the Governor neither tried nor considered. (V. Compl., RE222–225 ¶¶ 126–139.)

> Notably, 15 other Governors trusted the people of their states and exempted religious gatherings from any attendance limitations during this pandemic. The Governor has failed to cite any peer-reviewed study showing that religious interactions in those 15 states have accelerated the spread of COVID-19 in any manner distinguishable from nonreligious interactions. Likewise, common sense suggests that religious leaders and

> worshipers (whether inside or outside [the State]) have every incentive to behave safely and responsibly whether working indoors, shopping indoors, or worshiping indoors. **The Governor cannot treat religious worship as a world apart from nonreligious activities with no good, or more importantly, constitutional, explanation**.

Berean Baptist, 2020 WL 2514313, at *9 (emphasis added) (footnote omitted). Harvest Churches have demonstrated they can observe the distancing and hygiene guidance that the Governor deems sufficient for exempt businesses and nonreligious gatherings. (V. Compl., RE220–222 ¶¶ 119–125.) There is no justification for depriving Harvest Churches of the same consideration or benefit going forward.

Indeed, as the *On Fire* court reasoned, the Governor is unlikely to be able to demonstrate that he deployed the least restrictive means because his Orders, and their application,

> are **"underinclusive"** ***and*** **"overbroad."** They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that the Commonwealth has permitted . . . . Those . . . activities include . . . walking into a liquor store where other customers are shopping. The Court does not mean to impugn the perfectly legal business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is "essential," **so is [church]**.

On Fire, 2020 WL 1820249, at *7 (emphasis added) (footnote omitted). Because of the Governor's failure to tailor his gathering restrictions to closely fit the safety ends he espouses, and failure to try other, less restrictive alternatives that he cannot demonstrate are not working in other jurisdictions across the country, Harvest

Churches "can likely show that the broad prohibition against in-person religious services . . . is not narrowly tailored to achieve the stated public health goals where the comparable secular gatherings are subjected to much less restrictive conditions." *First Baptist*, 2020 WL 1910021, at *8.

F. The District Court and This Court's IPA Panel Majority Mishandled the Applicable Legal Burdens in Denying Harvest Churches Injunctive Relief.

As shown above, it is the Governor's burden to justify the disparate restrictions of his Orders under the First Amendment. (*See supra* Standard of Review; Argument Part I.E.) Both the district court and this Court's IPA Panel majority, however, improperly shifted that burden to Harvest Churches in denying injunctive relief.

The district court noted at several points in its PI Order that Harvest Churches had failed to produce evidence regarding the comparative risks of COVID-19 spread across the various activities regulated by the Governor's Orders. (PI Order, RE3–4, nn.3–4.) Likewise, the IPA Panel majority discredited Harvest Churches for not countering the Governor's "evidence" on the risk of indoor worship.[11] 2020 WL 5835219, at *1. But, in this First Amendment case, it is not Harvest Churches'

[11] The IPA Panel majority's decision is not binding on this Panel or any subsequent panel in the case. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1263 (9th Cir. 2020).

burden to justify the Governor's restrictions; the burden is the Governor's. *See Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) ("[T]he burden shifts to the government to justify the restriction."). Indeed, seven 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.").

Despite his high burden, however, the Governor's supposed "evidence" is illusory. 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*. (Decl. James Watt, M.D., M.P.H., RE156–164.) 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).

As Judge O'Scannlain observed in his dissent from the IPA Panel majority's decision,

> even if we were to accept Dr. Watt's assertion that the State has reason to find religious services more dangerous than activities like shopping or working in an office, the glaring problem for the State is that it has offered no evidence to support the notion that the myriad *other* activities which are less restricted than religious services are somehow safer by these same parameters.

2020 WL 5835219, at *5; *cf. Tabernacle*, 2020 WL 2305307, at *5 ("There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking."). Thus, the failure of evidence is on the Governor's side, and he has failed to carry his burden of justifying his Order's disparate restriction scheme under the First Amendment.

The district court and IPA Panel majority both erred also in relying on the Supreme Court's denial of an extraordinary interlocutory writ of injunction to a church challenging a prior version of Governor Newsom's worship restrictions in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). To be sure, the *South Bay* Court did not issue an opinion explaining its denial, noting only that Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the injunction. *Id.* at 1613. But the decision was accompanied by the lone concurring opinion of Chief Justice Roberts (joined by no other Justice), and the dissenting

opinion of Justice Kavanaugh in which Justices Thomas and Gorsuch joined. *Id.* at 1613–15.

Although the IPA Panel majority acknowledged the *South Bay* decision to deny injunctive relief is not binding on this Court, the majority nonetheless found it persuasive. 2020 WL 5835219, at *2. But Chief Justice Roberts' concurrence, which the IPA Panel majority cited, focused focused primarily on the extremely high bar an applicant must reach to obtain emergency, interlocutory injunctive relief from the Supreme Court, noting "[t]his 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. As Judge O'Scannlain explained in his dissent from the majority, Chief Justice Roberts was applying "a more demanding standard" than that which applies to preliminary injunctive relief sought from this Court.[12] 2020 WL 5835219, at *2.

II. HARVEST CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ESTABLISHMENT CLAUSE CLAIMS.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their

[12] "The standard for evaluating an injunction pending appeal is similar to that employed . . . in deciding whether to grant a preliminary injunction." *Feldman v. Az. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016).

faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Where, as here, Harvest Churches seek to be free from disparate treatment by the State, the very core of the Establishment Clause is at issue. "An 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). That mandate of preventing hostility towards religions is equally present in times of exigent circumstances, such as COVID-19. For, as "[a]n instrument of social peace, the Establishment Clause does not become less so when social rancor runs exceptionally high." *Lund v. Rowan Cnty.*, 863 F.3d 268, 275 (4th Cir. 2017) (emphasis added). "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . Neither can force nor influence a person to go to or to remain away from church against his will." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added).

Here, the Governor's orders have demonstrated official hostility towards religious worship by completely prohibiting worship *inside churches* in an ever-fluctuating number of counties, and banning the core religious practices of singing

and chanting in the counties where indoor worship is still allowed, albeit severely restricted. (V. Compl., RE204–207 ¶¶ 84–97.) Moreover, the Governor's total worship ban includes gatherings of small groups for in-home Bible studies or worship. (V. Compl., RE200–201 ¶¶ 73, RE206–207 ¶¶ 94–97.) Violation of the Orders is punishable by criminal citation, and Harvest Churches' pastors can be arrested for simply gathering their congregations for worship services. (V. Compl., RE201 ¶ 74.) Yet, no such criminal sanction or punishment has been threatened against the thousands of protesters continually gathering in flagrant disregard of the Governor's orders. (V. Compl., RE209–220 ¶¶ 104–118.) Such openly disparate treatment towards religious exercise constitutes official hostility towards religion in violation of the Establishment Clause.

III. HARVEST CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE SPEECH AND ASSEMBLY CLAIMS.

A. The Governor's Orders Are Content-Based Restrictions on Speech.

"Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (same). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter,

and others are more subtle, defining regulated speech by its function or purpose. **Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny**." *Reed*, 135 S. Ct. at 2227 (emphasis added). Put simply, the Supreme Court handed down a firm rule: **laws that are content based on their face must satisfy strict scrutiny**. *Id.*

Importantly, this firm rule mandating strict scrutiny of facially content-based restrictions of speech applies regardless of the government's alleged purpose in enacting the law, even if the alleged purpose arises from a declared emergency. *See id.* ("On its face, the [law] is a content-based regulation of speech. **We thus have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny**.").

Thus, content-based laws must satisfy strict scrutiny, regardless of any purported justification the Governor may assert. *Reed*, 135 S. Ct. at 2229. "Because the [law] imposes content-based restrictions on speech, those provision can stand only if they survive strict scrutiny." *Id.* at 2231. **There are no exceptions to this rule**. Indeed, the notion that a content-based restriction on speech is presumptively unconstitutional is "so engrained in our First Amendment jurisprudence that last term we found it so 'obvious' as to not require explanation." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991). Furthermore, "[i]t is rare that a regulation restricting speech because of its content

will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The burden is on the Governor to prove his orders satisfy strict scrutiny, and he cannot.

Here, it is beyond cavil that the Governor's orders, both facially and as-applied, are content based. When it comes to the thousands of protesters openly violating his orders to share—shout, sing, and chant—their message, the Governor said "Thank you! God bless you. Keep doing it." (V. Compl., RE209 ¶ 104.) Yet, as the orders make plain, Harvest Churches' religious worship services, consisting of preaching, singing, and chanting—all speech—are completely prohibited or severely restricted. (V. Compl., RE204–207 ¶ 83–95.) When asked to explain this unconstitutional dichotomy, the Governor merely confirmed that some speech (protest) is "profound and pronounced" and must be supported and encouraged (V. Compl., RE209–210 ¶ 105), but other forms of expression—*religious* preaching, singing, and chanting—at Harvest Churches' worship services is simply too dangerous to permit. The Governor's own statements prove his orders and their application are content-based speech restrictions and must satisfy strict scrutiny.

B. The Governor's Orders Cannot Satisfy Strict Scrutiny.

As demonstrated in Part I.E, *supra*, the Governor's orders cannot satisfy strict scrutiny, and are therefore unconstitutional.

IV. HARVEST CHURCHES SATISFY THE REMAINING PRELIMINARY INJUNCTION REQUIREMENTS.

A. Harvest Churches Have No Adequate Remedy at Law and Will Suffer Irreparable Harm if a Preliminary Injunction Is Denied.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (emphasis added)). Thus, demonstrating irreparable injury in this matter "is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today." *On Fire*, 2020 WL 1820249, at *9 (emphasis added).

B. The Balance of Harms and Public Interest Favor a Preliminary Injunction.

A preliminary injunction enjoining enforcement of the Governor's orders prohibiting Harvest Churches' responsibly conducted worship services will impose no harm on the State, and will protect the very rights the Supreme Court has characterized as "lying at the foundation of a free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). Indeed, the State "is in no way harmed by the issuance of an injunction that prevents the state from enforcing

unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). But, for Harvest Churches, even minimal infringements upon First Amendment values constitute irreparable injury sufficient to justify injunctive relief. *Id.* at 302. As such, there is no comparison between the irreparable loss of First Amendment freedoms suffered by Harvest Churches here and the non-existent interest the State has in enforcing unconstitutional orders. Absent a preliminary injunction, Harvest Churches "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On Fire*, 2020 WL 1820249, at *9. The balance favors injunctive relief.

Also, the public interest is served by a preliminary injunction. "Injunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added). "First Amendment rights are not private rights of the appellants so much as they are rights of the general public. Those guarantees [are] for the benefit of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288–90 (5th Cir. 1969) (cleaned up). **"[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added). Thus, the balance of the equities tips decidedly in Harvest Churches' favor, and a preliminary injunction is in the public interest.

CONCLUSION

For all of the foregoing reasons, the district court should be reversed, and the preliminary injunction should issue.

STATEMENT OF RELATED CASES

The following cases pending before this Court are related to the present matter because they raise the same or closely related issues regarding COVID-19-related restrictions on religious worship: *Gish v. Newsom*, No. 20-55445; *South Bay United Pentecostal Church v. Newsom*, No. 20-55533; *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169.

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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 October 3, 2020.

/s/ Roger K. Gannam
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