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21 UNITED STATES DISTRICT COURT
22 CENTRAL DISTRICT OF CALIFORNIA
23 LOS ANGELES DIVISION

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

28 *Plaintiffs,*

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

Defendant.

Case No. 2:20-cv-06414-JGB-KK

**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF EMERGENCY
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

The Honorable Jesus G. Bernal
Hearing Date: Jan. 4, 2021 9:00 AM

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1 ***“It is time—past time—to make plain that, while the pandemic poses many grave***
2 ***challenges, there is no world in which the Constitution tolerates color-coded***
3 ***executive edicts that reopen liquor stores and bike shops but shutter churches,***
4 ***synagogues, and mosques.”¹***

5 **URGENCIES JUSTIFYING RELIEF BY SUNDAY, DECEMBER 6, 2020**

6 Plaintiffs need immediate relief by **this Sunday, December 6, 2020** because
7 they face the unconscionable and unconstitutional choice of attending religious
8 worship services or facing criminal punishment, jail, daily fines, and the closure of
9 their Churches. And, Harvest Rock Church has been explicitly threatened with daily
10 criminal punishment, fines, imprisonment, and closure of its Church for violating the
11 Governor’s unconstitutional color-coded regime of religious discrimination. As the
12 City of Pasadena City Attorney/City Prosecutor’s demand letter states: “Any violations
13 in the future will subject your Church, owners, administrators, operators, staff, and
14 parishioners to the above-mentioned criminal penalties as well as the potential closure
15 of your Church.” (Dkt. 45-2.) It specifically threatens Plaintiffs with daily fines and
16 imprisonment for each separate violation. (*Id.* (“Each day in violation is a separate
17 violation and carries with it a potential punishment of up to one year in jail and a fine
18 for each violation.”).) It is long past time for this unconstitutional regime of threatening
19 Churches and parishioners with prison for exercising their faith and worshipping. A
20 TRO and preliminary injunction should issue before Sunday, December 6, 2020.
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27 ¹ *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, -- S. Ct. --, 2020
28 WL 694835 (U.S. Nov. 25, 2020) (Gorsuch, J., concurring) (emphasis added)
[hereinafter *Catholic Diocese*].

INTRODUCTION

1
2 Plaintiffs’ file this request for a TRO and preliminary injunction following **the**
3 **Supreme Court’s order that vacated all previous denials and instructed this Court**
4 **to reconsider its previous rulings in light of *Catholic Diocese of***
5 ***Brooklyn v. Cuomo*, 592 U.S. — (2020). See *Harvest Rock Church v. Newsom*, No.**
6 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020). Indeed, the Supreme Court granted
7 Plaintiffs’ petition for a writ of certiorari, vacated all of the orders in both this Court
8 and the Ninth Circuit, and instructed this Court to reconsider Plaintiffs’ requests for a
9 TRO and preliminary injunction. Specifically, it stated:

11 The application for injunctive relief, presented to Justice Kagan and by her
12 referred to the Court, is treated as a petition for a writ of certiorari before
13 judgment, and the petition is granted. The September 2 order of the United
14 States District Court for the Central District of California is vacated, and
15 the case is remanded to the United States Court of Appeals for the Ninth
16 Circuit with instructions to remand to the District Court for further
consideration in light of *Roman Catholic Diocese of Brooklyn v. Cuomo*,
592 U.S. — (2020).

17 *Id.*; see also *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 7075072,
18 *1 (9th Cir. Dec. 3, 2020) (noting the Supreme Court’s order and remanding the instant
19 case to this Court for reconsideration).²

21 On December 3, the same day the Supreme Court issued its order, the Ninth
22 Circuit Court of Appeals vacated its order and this Court’s order, remanding the case
23 in accordance with the Supreme Court’s directive. The *Catholic Diocese* case demands
24 a finding that the discriminatory regime of the Governor’s color-coded executive
25 decrees violate the Free Exercise Clause. Therefore, the Governor’s color-coded

26
27 ² A true and correct copy of Plaintiffs’ Application for a Writ of Injunction and
28 Reply in support of that Application are attached hereto as Exhibits A and B,
respectively.

1 prohibitions and restrictions on Plaintiffs’ religious worship services violate the First
2 Amendment and must be enjoined.

3 In fact, the regime at issue in the instant litigation is far worse than that enjoined
4 in *Catholic Diocese*. There, the restrictions enjoined restricted religious worship
5 services to 10 or 25 individuals depending on the zone. 2020 WL 694835, at *1. A
6 majority of the Court unequivocally held that “the Governor’s severe restrictions on
7 applicants’ religious services must be enjoined.” *Id.* at *4.

9 And, what’s more, even the Chief Justice believed that such restrictions violate
10 the First Amendment. Chief Justice Roberts opined that “[n]umerical capacity limits of
11 10 and 25 people, depending on the applicable zone, **do seem unduly restrictive. And**
12 **it may well be that such restrictions violate the Free Exercise Clause.**” *Id.* at *9
13 (emphasis added). Indeed, the Chief Justice noted that such restrictions – which are
14 less restrictive than the Governor’s total prohibition on religious worship services in
15 Tier 1 here – “**raise serious concerns under the Constitution.**” *Id.* (emphasis added).
16 The only reason the Chief Justice did not join the majority was because “the Governor
17 revised the designations” and “[n]one of the houses of worship identified in the
18 applications is now subject to any fixed numerical restrictions.” *Id.* That mootness issue
19 was the sole reason the Chief Justice declined to join the majority for the injunction,
20 and even he noted that the churches could immediately return to the Court if the
21 Governor reimposed the restrictions at issue. *Id.* (“If the Governor does reinstate the
22 numerical restrictions the applicants can return to this Court, and we could act quickly
23 on their renewed applications.”).

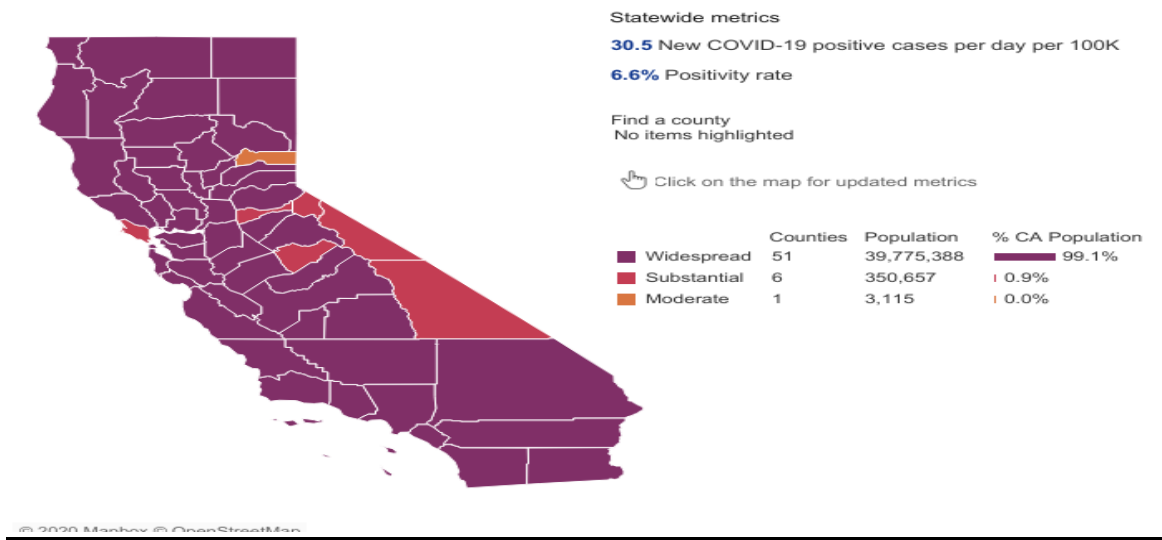
24 Thus, six of the Justices found serious constitutional infirmity in restrictions of
25 10 and 25 people. **And, here, the restrictions are far worse.** Indeed, the restrictions
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1 in Tier 1 here **totally prohibit religious worship services of any kind and any**
 2 **number**. If restricting religious worship services to 10 and 25 individuals “strike at the
 3 very heart of the First Amendment,” *id.* at *3, and violate strict scrutiny, *id.*, then there
 4 is no world in which a total prohibition on religious worship services survives First
 5 Amendment condemnation. The Governor’s orders are plainly unconstitutional, and a
 6 TRO and preliminary injunction should issue immediately.

7 **STATEMENT OF FACTS**

8
 9 As of November 28, 51 Counties in California – representing **99.1% of the**
 10 **population** – are in Tier 1 under the Governor’s Blueprint for a Safer Economy. The
 11 below image –from California’s official Blueprint website – demonstrates how
 12 widespread the Governor’s most severe restrictions are in California.³

13 **Image 1 – Blueprint Map**



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 23 The consequence of the sea of purple in the above “color-coded executive edict”
 24 is that **indoor worship services are completely prohibited for 99.1% of**
 25 **Californians, including the vast majority of Plaintiffs’ Churches and congregants.**

26
 27 (See Joint Statement of Parties for Ninth Circuit Injunction Pending Appeal, “Joint

28 ³ Blueprint for a Safer Economy, *Current tier assignments as of November 28, 2020*, <https://covid19.ca.gov/safer-economy/> (last visited Nov. 30, 2020)

1 Statement, attached as EXHIBIT C, at 1.) Yet, food packing and processing,
2 laundromats, and warehouses have no capacity limits, liquor and grocery stores have a
3 50% capacity, and big box centers, shopping malls, laundromats, and destination
4 centers have a 25% capacity. (See Addendum 1, “Addendum,” at 1.) For the 0.9% of
5 Californians in Tier 2 Counties, the Governor permits limited indoor worship at 25%
6 capacity or 100 individuals, whichever is less. (Ex. C, Joint Statement at 1.) Yet, other
7 similar congregate gatherings have no numerical limit, including museums, gyms, and
8 fitness centers. (Addendum at 2.) And, for the lone County designated Tier 3 (0.01%
9 of the population), religious worship is only permitted at 50% capacity or 200 people,
10 whichever is less. (Ex. C, Joint Statement at 2.) Yet again, in addition to a long list of
11 other similar congregate gatherings, museums, gyms, fitness centers, family
12 entertainment centers, cardrooms, and satellite wagering have no numerical cap.
13 (Addendum at 3.)

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16 For Plaintiffs, this means that the Governor’s color-coded regime of religious
17 discrimination **completely prohibits indoor religious worship services, even if it**
18 **involves 1 person.** And, in Tiers 2 and 3, where religious services have a numerical
19 cap while similar nonreligious gatherings do not, the Governor prohibits Plaintiffs and
20 their congregants from singing or chanting. (Ex. C, Joint Statement at 4.) No similar
21 restriction is placed on singing “Happy Birthday” in a restaurant or Christmas carols in
22 a mall. Thus, the Governor’s COVID-19 color-coded executive edicts have literally
23 banned even “preaching to the choir.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).
24
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26 Yet, in these same Counties where indoor religious worship services are
27 completely prohibited or significantly restricted numerically, there are myriad
28 exemptions for similar nonreligious gatherings. (See Addendum at 1-3.) Moreover, the

1 Churches can conduct nonreligious meetings in the same buildings where worship is
2 banned, including feeding, sheltering, and other social services and “necessities of life”
3 such as counseling. Irreparable harm is being imposed on Plaintiffs by virtue of the
4 unconstitutional regime of the Governor’s edicts, and injunctive relief is warranted
5 now. Indeed, Harvest Rock Church, the pastors, staff, and parishioners labor every day
6 under the threat of criminal charges, fines, and closure. This immediate threat cannot
7 wait another day to be addressed. The TRO and preliminary injunction should issue.

9 LEGAL ARGUMENT

10 To obtain a TRO and preliminary injunction, Plaintiffs must show they are likely
11 to succeed on the merits, they will suffer irreparable harm absent injunctive relief, the
12 balance of the equities tips in their favor, and the public interest favors injunctive relief.
13 *Network Auto, Inc. v. Adv. Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011).
14 The elements for a TRO and preliminary injunction are the same. *See Rodriguez v.*
15 *Wolf*, No. 2:20-CV 01274, 2020 WL 1652541, *2 (C.D. Cal. Feb. 10, 2020). Plaintiffs
16 satisfy the requirements of the TRO and preliminary injunction easily because – as the
17 Supreme Court made plain in *Catholic Diocese* – “regulations that single out houses of
18 worship for especially harsh treatment” plainly violates the First Amendment and
19 makes “a strong showing that the challenged restrictions violate ‘the minimum
20 requirement of neutrality’ to religion.” *Catholic Diocese*, 2020 WL 6948354, at *1
21 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).
22 The Governor’s color-coded regime of discriminatory treatment towards religion is far
23 more restrictive than that the Supreme Court enjoined in *Catholic Diocese* and violates
24 the Free Exercise Clause “beyond all question.” *On Fire Christian Ctr., Inc. v. Fischer*,
25 453 F. Supp. 3d 901, 910 (W.D. Ky. 2020).
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1 **I. CATHOLIC DIOCESE MANDATES THAT PLAINTIFFS ARE LIKELY**
2 **TO SUCCEED ON THE MERITS AND A TRO AND PRELIMINARY**
3 **INJUNCTION IS WARRANTED NOW.**

4 **A. The Color-Coded Tier Restrictions Are More Restrictive Than Those**
5 **In *Catholic Diocese*, Discriminate Between Religious And**
6 **Nonreligious Gatherings, And Violate The First Amendment.**

7 **1. Completely Prohibiting All Indoor Worship Services Is Plainly**
8 **Unconstitutional And Violates The Free Exercise Clause.**

9 As demonstrated *supra* and admitted by the Governor (*supra* Image 1), the
10 Blueprint completely prohibits indoor religious worship services in 51 Counties
11 representing 99.1% of the California population. *See supra* Image 1. In *Catholic*
12 *Diocese*, this Court held that New York’s capacity limitations of more than 10 or 25
13 people were “far more restrictive than any COVID-related regulations that have
14 previously come before the Court.” 2020 WL 6948354, at *2. Yet, the Governor’s
15 regulations here – which completely prohibit all indoor religious worship services for
16 99.1% of Californians – **are far more restrictive than those in *Catholic Diocese*.**
17 There can be no more restrictive regulations than a total ban on religious gatherings for
18 the vast majority of Plaintiffs’ Churches. In Tier 1, Plaintiffs are prohibited from
19 gathering for any religious service with any number of people. Astoundingly, the same
20 prohibition applies to any religious gathering in the private homes of Plaintiffs’
21 congregants, regardless of the size of that small Bible study or service.

22 As the Supreme Court has held: “Neither a state nor the Federal Government can
23 set up a church . . . Neither can force nor influence a person to go to or remain away
24 from church against his will.” *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15
25 (1947). The Blueprint does what *Everson* said no state is permitted to do. The First
26 Amendment plainly prohibits banning all religious worship services, regardless of the
27 justification given for such a prohibition. In fact, the Chief Justice’s dissent in *Catholic*
28

1 *Diocese* suggests that imposing a total prohibition on religious worship services is
2 unconstitutional. *Catholic Diocese*, 2020 WL 6948354, at *9 (Roberts, C.J., dissenting)
3 (“Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do
4 seem unduly restrictive. **And it may well be that such restrictions violate the Free**
5 **Exercise Clause.**” (emphasis added)); *id.* (“the challenged restrictions raise serious
6 concerns under the Constitution.”).

7
8 If restrictions on 10 and 25 people “raise serious concerns under the
9 Constitution,” *id.*, then – as Justice Gorsuch plainly stated – “**there is no world in**
10 **which the Constitution tolerates color-coded executive edicts that reopen liquor**
11 **stores and bike shops but shutter churches, synagogues, and mosques.**” *Id.* at *7
12 (emphasis added). The Governor’s total prohibition on Plaintiffs’ religious worship
13 services of any number of people is simply unconstitutional and must be enjoined.
14

15 **2. *Catholic Diocese Prohibits The Governor’s Discriminatory***
16 ***Treatment Between Religious Worship Services And Similarly***
17 ***Situated Nonreligious Gatherings.***

18 In *Catholic Diocese*, the Supreme Court held that the applicant churches “clearly
19 established their entitlement to relief” because they “made a strong showing that the
20 challenged restrictions violate ‘the minimum requirement of neutrality’ to religion.”
21 2020 WL 6948354, at *1 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,
22 508 U.S. 520, 533 (1993)). Indeed, “**the regulations cannot be viewed as neutral**
23 **because they single out houses of worship for especially harsh treatment.**” *Id.*
24 (emphasis added). In *Catholic Diocese*, in the “red zone” a church could host no more
25 than 10 people, and “orange zone” churches were limited to 25 people. *Id.* at *2. But,
26 in “red zones,” “businesses categorized as ‘essential’ may admit as many people as
27 they wish,” and those “essential businesses” included “acupuncture facilities, camp
28

1 grounds, garages . . . plants manufacturing chemicals and microelectronics and all
2 transportation facilities.” *Id.* In the “orange zone,” the Court noted that “[t]he disparate
3 treatment is even more striking” because “[w]hile attendance at a house of worship is
4 limited to 25 persons, even non-essential businesses may decide for themselves how
5 many persons to admit.” *Id.*

6
7 As the Court held in *Catholic Diocese*, “[b]ecause the challenged restrictions are
8 not ‘neutral’ and ‘of general applicability,’ they must satisfy strict scrutiny.” 2020 WL
9 6948354, at *2 (citing *Lukumi*, 508 U.S. at 546). The same is true of the Governor’s
10 color-coded Blueprint and its discriminatory treatment of Plaintiffs’ religious worship
11 services.

12 **a. The Governor’s Discrimination Between Plaintiffs’**
13 **Churches And Nonreligious Gatherings In Tier 1 Cannot**
14 **Withstand Strict Scrutiny.**

15 The Governor’s color-coded Blueprint operates in much the same – yet even
16 harsher – fashion than the regime enjoined in *Catholic Diocese*. For 99.1% of the
17 population in Tier 1 Counties, no indoor religious worship service is permitted at all.
18 (Ex. C, Joint Statement at 1.) In that same Tier 1, however, food packaging and
19 processing plants, laundromats, and warehouses are permitted to operate **with no**
20 **numerical or capacity restrictions.** (Ex. C, Joint Statement at 6-7; Addendum at 1.)
21 Despite totally prohibiting indoor worship service regardless of the number of people
22 present or the size of the building, the Governor permits Grocery Stores and liquor
23 stores to operate at 50% capacity with no numerical cap, other “essential retail” at 25%
24 capacity with no numerical cap, and “Malls, Destination Centers, and Swap Meets” to
25 operate at 25% capacity with no numerical cap, and laundromats with no percentage or
26 numerical cap. (Joint Statement at 5; Addendum at 1.)
27
28

1 In *Catholic Diocese*, the Court held that limitations of 10 and 25 people for
2 religious worship services represented some of the most restrictive in the country. 2020
3 WL 6948354, at *2 (“They are far more restrictive than any COVID-related regulations
4 that have previously come before the Court, much tighter than those adopted by many
5 other jurisdictions hard-bit by the pandemic, and far more severe than has been shown
6 to be required to prevent the spread of the virus at the applicants’ services.”). Here, the
7 restriction is even more restrictive and far more severe than that at issue in *Catholic*
8 *Diocese*. In Tier 1, there is no religious service permitted indoors, regardless of the size
9 of the building or the number of people.

10
11 A complete prohibition of religious worship services cannot be the least
12 restrictive means. Nonreligious gatherings are not subject to complete prohibitions in
13 Tier 1 and are permitted to operate without any numerical restriction whatsoever.

14
15 At the same time, the Governor has chosen to impose *no* capacity
16 restrictions on certain businesses he considers “essential.” And it turns out
17 the businesses the Governor considers essential include hardware stores,
18 acupuncture, and liquor stores. Bicycle repair shops, certain signage
19 companies, accountants, lawyers, and insurance agents are all essential
20 too. So, at least according to the Governor, it may be unsafe to go to
21 church, but it is always fine to pick up another bottle of wine, shop for a
22 new bike, or spend the afternoon exploring your distal points and
23 meridians. Who knew public health would so perfectly align with secular
24 convenience?

25 2020 WL 6948354, at *4 (Gorsuch, J., concurring).

26 In Tier 1, much the same is true here. Judge O’Scannlain’s dissent in the Ninth
27 Circuit points out the similarity between the Governor’s restrictions here and those
28 Justice Gorsuch pointed out in *Catholic Diocese*:

indoor worship services are completely prohibited [but] in these same
counties, the State still allows people to go indoors to: spend a day
shopping in the mall, have their hair styled, get a manicure or pedicure,

1 attend college classes, produce a television show or movie, participate in
2 professional sports, wash their clothes at a laundromat, and even work in
a meatpacking plant.

3 *Harvest Rock Church*, 977 F.3d 728, 731 (9th Cir. 2020) (O’Scannlain, J., dissenting).

4 If the restrictions at issue in *Catholic Diocese* fail strict scrutiny by limiting religious
5 worship services to 10 or 25 people, then a total prohibition of religious worship
6 services – by definition – cannot be the least restrictive means available to the
7 Governor. A TRO and preliminary injunction should issue because the Governor’s
8 Blueprint and discrimination against religious worship services fails strict scrutiny.
9

10 **b. The Governor’s Discrimination Between Plaintiffs’**
11 **Churches And Nonreligious Gatherings In Tiers 2-3**
12 **Cannot Withstand Strict Scrutiny.**

13 Similarly, in Tiers 2-3, the restrictions (while effecting 0.9% of the population)
14 still impose discriminatory prohibitions on religious worship services and will do so
15 when the Governor decrees that certain Counties are permitted out of Tier 1’s reign of
16 terror completely banning religious worship services indoors.

17 In Tier 2, the treatment of religious worship services is also clearly
18 discriminatory. Plaintiffs’ Churches may operate at 25% capacity or 100 individuals,
19 whichever is fewer, but other gatherings are not subject to such restrictions or specific
20 numerical limitation. (Addendum at 2.) Food packaging and processing, laundromats,
21 and warehouses may continue to operate without capacity limitations or numerical
22 caps. (*Id.*) Grocery Stores, “Essential Retail” (*e.g.*, Walmart, Lowe’s, Home Depot, and
23 other “big box” stores), liquors stores, Shopping Malls, Destination Centers, and Swap
24 Meets may operate at 50% capacity but with no explicit numerical cap. (*Id.*) Museums
25 may operate at 25% capacity but without an express numerical limit, and gyms may
26 operate at 10% capacity with no numerical cap. (*Id.*) Ten percent capacity of Harvest
27
28

1 Rock Church's 1250 seats is 125, and 25% is 312. The capacity increases with the size
2 of the building for every other similar congregational gatherings except places of worship!

3 In Tier 3, the treatment of Plaintiffs Churches' religious worship service is again
4 unconstitutionally discriminatory. Plaintiffs may operate at 50% capacity or 200
5 people, whichever is fewer. (Ex. C, Joint Statement at 2; Addendum at 3.) Food
6 packaging and processing, laundromats, warehouses, grocery stores, "big box" stores,
7 malls, destination centers, and swap meets may all operate with any capacity or
8 numerical restriction of any kind. (Addendum at 3.) Museums are permitted 50%
9 capacity but with no numerical limitation. (*Id.*) Gyms, fitness centers, family
10 entertainment centers, and cardrooms and satellite wagering centers may all operate at
11 25% capacity but with no numerical limitation. (*Id.*) Using Harvest Rock Church as an
12 example, 25% would permit 312 people and 50% permits 625 people, but places of
13 worship in Tier 3 are limited no more than 200 people no matter the building size.

14 Thus, while the Supreme Court suggested that restricting religious worship
15 services based on the size of the facility **might** be a less restrictive alternative to 10 or
16 25-person caps, *Catholic Diocese*, 2020 WL 6948354, at *2, it is by no means the
17 Governor's saving grace. The Governor's restrictions on religious worship services in
18 Tiers 2-3 are precisely the type of discrimination prohibited by *Catholic Diocese*. The
19 overall holding of *Catholic Diocese* emphasizes that the Governor is not permitted to
20 treat religious worship services less favorably than other nonreligious gatherings.
21 Indeed, as Justice Kavanaugh succinctly stated:

22 The State argues that it has not impermissibly discriminated against
23 religion because some secular businesses such as movie theaters must
24 remain closed and are thus treated less favorably than houses of worship.
25 **But under this Court's precedents, it does not suffice for a State to**

1 **point out that, as compared to houses of worship, *some* secular**
2 **businesses are subject to similarly severe or even more severe**
3 **restrictions.**

4 *Id.* at *8 (Kavanaugh, J., concurring) (emphasis added). The fact that the Governor only
5 imposes strict numerical caps on religious businesses while “[e]ssential businesses and
6 many non-essential businesses are subject to no attendance caps at all” demonstrates
7 that Governor has violated the First Amendment.

8 **“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.**
9 **The restrictions at issue here, by effectively barring many from attending**
10 **religious services, strike at the very heart of the First Amendment's guarantee of**
11 **religious liberty.”** *Id.* at *3 (emphasis added). And,

12 People may gather inside for extended periods in bus stations and airports,
13 in laundromats and banks, in hardware stores and liquor shops. No
14 apparent reason exists why people may not gather, subject to identical
15 restrictions, in churches or synagogues, especially when religious
16 institutions have made plain that they stand ready, able, and willing to
17 follow all the safety precautions required of “essential” businesses and
18 perhaps more besides. The only explanation for treating religious places
19 differently seems to be a judgment that what happens there just isn't as
20 “essential” as what happens in secular spaces. Indeed, the Governor is
21 remarkably frank about this: In his judgment laundry and liquor, travel
22 and tools, are all “essential” while traditional religious exercises are
23 not. ***That is exactly the kind of discrimination the First Amendment***
24 **forbids.**

25 *Id.* at *4 (Gorsuch, J., concurring) (bold emphasis added). The Governor’s color-coded
26 executive edicts restricting religious worship should meet the same fate.

27 **B. This Court’s Reliance On *South Bay* And Its Concomitant Extension**
28 **Of Undue Deference To The Governor Was In Error.**

 This Court’s previous denial of Plaintiffs’ motion for preliminary injunction
placed great emphasis on the deferential standard that should be applied to government

1 during a perceived pandemic. (Dkt. 53, *Harvest Rock Church v. Newsom*, No. LACV
2 20-6414 JCB (KKx), 2020 WL 5265564, *3 (C.D. Cal. Sept. 2, 2020) (“the Governor
3 has determined that these activities are essential services, and therefore must be
4 exempted from other guidelines for the health and safety of California residents—a
5 determination which is entitled to this Court’s deference.”); *id.* (citing *South Bay*
6 *United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J.,
7 concurring). *See also Harvest Rock Church*, 977 F.3d at 731 (relying upon the Chief
8 Justice’s concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct.
9 1613, 1614 (2020) to note that deference to state governments is warranted during a
10 perceived crisis). That reliance was mistaken, and **the Supreme Court has now**
11 **vacated both this Court’s denial of Plaintiffs’ motion for preliminary injunction**
12 **and the Ninth Circuit denial of Plaintiffs’ request for an injunction pending**
13 **appeal.** *See Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S.
14 Dec. 3, 2020).

15
16
17 Much like many courts before it, this undue level of deference derives its
18 rationale from *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). “To justify its result,
19 the concurrence reached back 100 years in the U.S. Reports to grab hold of our decision
20 in *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905).” *Catholic Diocese*, 2020 WL
21 6948354, *5 (Gorsuch, J., concurring). But, “***Jacobsen* hardly supports cutting the**
22 **Constitution loose during a pandemic. That decision involved an entirely different**
23 **mode of analysis, an entirely different right, and an entirely different kind of**
24 **restriction.” *Id.* (emphasis added).**

25
26
27 Contrary to this Court’s previous and unwarranted extension of undue deference
28 to infringements on fundamental rights and their reliance on *Jacobsen* to do it,

1 “*Jacobsen* didn’t seek to depart from normal legal rules during a pandemic, and it
2 supplies no precedent for doing so.” *Id.*

3
4 Instead, *Jacobson* applied what would become the traditional legal test
5 associated with the right at issue—exactly what the Court does today.
6 Here, that means strict scrutiny: The First Amendment traditionally
7 requires a State to treat religious exercises at least as well as comparable
8 secular activities unless it can meet the demands of strict scrutiny—
9 showing it has employed the most narrowly tailored means available to
10 satisfy a compelling state interest.

11 *Id.*

12 “Even if judges may impose emergency restrictions on rights that some have
13 found hiding in the Constitution’s penumbras, **it does not follow that the same fate
14 should befall the textually explicit right to religious exercise.**” *Id.* (emphasis added).

15 As Justice Gorsuch noted, “no Justice now disputes any of these points. Nor does any
16 Justice seek to explain why anything other than our usual constitutional standards
17 should apply during the current pandemic.” *Id.* at *6. Noting the heavy reliance lower
18 courts have placed on *Jacobsen*, Justice Gorsuch continued,

19 Why have some mistaken this Court’s modest decision in *Jacobson* for a
20 towering authority that overshadows the Constitution during a pandemic?
21 In the end, I can only surmise that much of the answer lies in a particular
22 judicial impulse to stay out of the way in times of crisis. But if that impulse
23 may be understandable or even admirable in other circumstances, **we may
24 not shelter in place when the Constitution is under attack.** Things
25 never go well when we do.

26 *Id.* (emphasis added). *See also id.* at *8 (Kavanaugh, J., concurring) (“[J]udicial
27 deference in an emergency or crisis does not mean wholesale judicial abdication,
28 especially when important questions of religious discrimination, racial discrimination,
free speech, or the like are raised.”).

There is no pandemic pause button on the First Amendment. “Saying so now

1 will dispel, as well, misconceptions about the role of the Constitution in times of crisis,
2 which have already been permitted to persist for too long.” *Id.* at *6 (Gorsuch, J.,
3 concurring). Indeed, “[e]ven if the Constitution has taken a holiday during this
4 **pandemic, it cannot become a sabbatical.** Rather than applying a nonbinding and
5 expired concurrence from *South Bay*, courts must resume applying the Free Exercise
6 Clause.” *Id.* at *5 (emphasis added).

8 Prior to *Catholic Diocese*, that decision was also reached by the Western District
9 of Pennsylvania in a well-reasoned opinion essentially adopted by the Supreme Court.
10 *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 55106990, *6 (W.D. Pa. Sept. 14,
11 2020). There, the court noted that “[a]lthough the *Jacobsen* Court unquestionably
12 afforded a substantial level of deference to the discretion of state and local officials in
13 matters of public health, it did not hold that discretion limitless.” *Id.* And, since the
14 time *Jacobsen* was decided well over a century ago, “there has been substantial
15 development of federal constitutional law in the area of civil liberties [and] this
16 development has seen a jurisprudential shift whereby federal courts **have given greater**
17 **deference to considerations of individual liberties**, as weighed against the exercise
18 of state police powers.” *Id.* (emphasis added).

21 Courts are generally willing to give **temporary** deference to **temporary**
22 measures aimed at remedying a fleeting crisis. . . . **But, that deference**
23 **cannot go on forever. . . . Faced with ongoing interventions of**
24 **indeterminate length, “suspension” of normal constitutional levels of**
25 **scrutiny may ultimately lead to the suspension of constitutional**
26 **liberties themselves.**

27 *Id.* at *9 (emphasis added).

28 While respecting the immediate role of the political branches to address
emergent situations, the judiciary cannot be overly deferential to their

1 decisions. **To do so risks subordinating the guarantees of the**
 2 **Constitution**, guarantees which are the patrimony of every citizen, to the
 3 immediate need for an expedient solution. This is especially the case
 4 where, as here, measures directly impacting citizens are taken outside the
 5 normal legislative or administrative process by Defendants alone. There
 6 is no question that our founders abhorred the concept of one-person rule.
 7 The decried government by fiat. **Absent a robust system of checks and**
 8 **balances, the guarantees of liberties set forth in the Constitution are**
 9 **just ink on parchment.** There is no question that a global pandemic poses
 10 serious challenges to governments and for all Americans **But the**
 11 **response to a pandemic (or any emergency) cannot be permitted to**
 12 **undermine our system of constitutional liberties.**

13 *Id.* at *10 (emphasis added).

14 “Using normal levels of constitutional scrutiny in emergency circumstances does
 15 not prevent governments from taking extraordinary actions to face extraordinary
 16 situations.” *Id.* It just requires them to understand that the Constitution does not have a
 17 pause button in times of perceived crisis. Put simply, “[t]he application of normal
 18 scrutiny will only require the government to respect the fact that the Constitution
 19 applies even in times of emergency.” *Id.* (emphasis added). That holding has now
 20 been accepted as correct by the Supreme Court in *Catholic Diocese*, and it demonstrates
 21 that a TRO and preliminary injunction should issue in this matter instantly.

22 C. The Governor’s Orders Plainly Violate The Establishment Clause.

23 In their Verified Complaint, Churches challenged the Orders as a violation the
 24 Establishment Clause. (V.Compl. ¶¶222-243.) In *Everson v. Bd. of Educ. of Ewing*
 25 *Twp.*, 330 U.S. 1, 15 (1947), this Court unequivocally held that “[t]he establishment
 26 of religion clause of the First Amendment means at least this: Neither a state nor
 27 the Federal Government can set up a church . . . Neither can force nor influence
 28 a person to go to or remain away from church against his will.” *Id.* at 15 (emphasis

1 added). Also, this Court’s precedents make clear that “[a]n attack founded on disparate
 2 treatment of religious claims invokes what is perhaps the central purpose of the
 3 Establishment Clause—the purpose of ensuring government neutrality in matters of
 4 religion.” *Gillette v. United States*, 401 U.S. 437, 449 (1971). Finally, in *Lynch v.*
 5 *Donnelly*, this Court held that the Establishment Clause “affirmatively mandates
 6 accommodation, not merely tolerance, of all religions, and forbids hostility towards
 7 any. 465 U.S. 668, 674 (1984) (emphasis added). The *Everson*, *Gillette*, and *Lynch*
 8 triumvirate dictate that the Orders’ disparate treatment of religious worship as
 9 compared to nonreligious gatherings at myriad other locations or nonreligious
 10 gatherings in Churches’ own buildings violates the Establishment Clause. Put simply,
 11 the Orders force Churches and congregants to remain away from Church against their
 12 will, an indisputable violation of the Establishment Clause.
 13
 14

15 **II. PLAINTIFFS HAVE SUFFERED, ARE SUFFERING, AND WILL**
 16 **CONTINUE TO SUFFER IRREPARABLE HARM EACH DAY THE**
 17 **GOVERNOR’S ORDERS REMAIN IN PLACE.**

18 Irreparable harm is being suffered each and every day Plaintiffs remain subject
 19 to the unconstitutional restrictions, coupled with daily criminal threats, fines, and
 20 closure. No pastor, church, or parishioner in America should have to choose between
 21 worship and prison. As Justice Kavanaugh also recognized,
 22

23 **There is also no good reason to delay issuance of the injunctions . . .**
 24 **issuing the injunctions now rather than a few days from now will not only**
 25 **ensure that the applicants’ constitutional rights are protected, but also will**
 26 **provide some needed clarity for the State and religious organizations.**

27 *Id.* at *9 (Kavanaugh, J., concurring) (emphasis added).

28 “There can be no question that the challenged restrictions, if enforced, will cause
 irreparable harm.” *Catholic Diocese*, 2020 WL 6948354, at *3. Indeed, “[t]he loss of

1 First Amendment freedoms, for even minimal periods of time, unquestionably
2 constitutes irreparable injury.” *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
3 Yet, here, the irreparable harm is even more pronounced for multiple reasons: (1) all
4 of Plaintiffs’ Churches in Tier 1 are completely prohibited from hosting any religious
5 worship services, regardless of the number in attendance, and (2) Plaintiffs’ Churches,
6 pastors, staff, and parishioners face threats of *daily criminal charges* (each up to one
7 year in prison), *fin****es***, ***and closure***.

9
10 **A. Plaintiffs Suffer Irreparable Harm Each Day The Orders Remain In Place.**

11 “If only 10 people are admitted to each service, the great majority of those who
12 wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred.”
13 *Catholic Diocese*, 2020 WL 6948354, at *3. That alone was sufficient for the Supreme
14 Court to find irreparable harm, and it is all the more true here where Plaintiffs’
15 Churches in Tier 1 (which represents 99.1% of all California residents and the vast
16 majority of Plaintiffs’ Churches) **are completely prohibited from having any**
17 **worship service with even one person**. Unlike in *Catholic Diocese* where only “the
18 great majority” of attendees and congregants would be barred, here, **every single**
19 **attendee is prohibited from attending a worship service**. And worse, the Pasadena
20 Prosecutor has threatened Harvest Rock Church with daily criminal charges and fines,
21 and the Pasadena Public Health Department has threatened closure and attorney’s fees.
22 (See dkt. 41-2. dkt. 45-2.) This is *per se* irreparable harm.

25
26 **B. Plaintiffs Suffer Under The Yoke Of Threatened Closure Of Their Churches Every Day The Orders Remain In Place.**

27 Not only are Plaintiffs suffering irreparable harm on their right to worship, but
28

1 they are also suffering irreparable harm by virtue of the governments' threat to
2 criminally sanction them and **close their Churches**. On August 11, 2020, the Pastor of
3 Harvest Rock Church received a letter from the Planning and Community Development
4 Department, Code Enforcement Division, for the City of Pasadena threatening criminal
5 penalties, including fines and imprisonment, for being open for worship against the
6 Governor's Orders and local health orders. (Dkt. 41-2.) On August 18, 2020, the
7 Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatened
8 in a letter daily criminal charges and \$1,000 fines against the pastors, staff, and
9 parishioners, **including closure of the church**. (Dkt. 45-2.) There is no world where
10 criminalizing and threatening closure of Plaintiffs' Churches comports with the Free
11 Exercise Clause. **Notably, the Governor makes no mention of this astounding**
12 **threat. And he has done nothing to alleviate these serious threats.**

15 As in *Catholic Diocese*, "the Governor has fought this case at every step of the
16 way." 2020 WL 6948354, at *6 (Gorsuch, J., concurring). Indeed, the Governor
17 continues to assert – even before this Court – that the pandemic permits him to impose
18 the **complete prohibitions on indoor religious worship services** and vigorously
19 defends his unconstitutional regime. The same vigorous defense was found by this
20 Court to warrant intervention in *Catholic Diocese*. 2020 WL 6948354, at *6 (Gorsuch,
21 J., concurring). This Court should reject the Governor's continued efforts to impose his
22 unconstitutional regime.

24 C. Applicants Comply With Safety Protocols.

25 In *Catholic Diocese*, this Court found it relevant that the applicants were willing
26 to engage in social distancing and enhanced sanitization to protect their congregants.
27 2020 WL 69483545, at *1. The sworn testimony below demonstrates that Plaintiffs
28

1 here are doing likewise. (V.Compl. at 43-45 (noting that Plaintiffs engage in social
2 distancing, inform guests to wear masks,⁴ and pay to have their Church professionally
3 sanitized after each service).) Also similar to *Catholic Diocese*, there are no reported
4 cases of COVID resulting from the Plaintiffs’ religious gatherings.
5

6 **III. THE REMAINING FACTORS ALSO FAVOR A TRO AND**
7 **PRELIMINARY INJUNCTION.**

8 **A. The Balance Of The Equities Favors A TRO And Preliminary**
9 **Injunction.**

10 A preliminary injunction enjoining enforcement of the Governor’s orders
11 prohibiting Plaintiffs’ responsibly conducted worship services will impose no harm on
12 the State, and will protect the very rights the Supreme Court has characterized as “lying
13 at the foundation of a free government of free men.” *Schneider v. New Jersey*, 308 U.S.
14 147, 151 (1939). Indeed, the State “is in no way harmed by the issuance of an injunction
15 that prevents the state from enforcing unconstitutional restrictions.” *Legend Night Club*
16 *v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). But for Plaintiffs, as noted above, even
17 minimal infringements upon First Amendment values constitute irreparable injury
18 sufficient to justify injunctive relief. *Id.* at 302. As such, there is no comparison
19 between the irreparable loss of First Amendment freedoms suffered by Plaintiffs here
20 and the non-existent interest the State has in enforcing unconstitutional orders. Absent
21 a TRO and preliminary injunction, Plaintiffs “face an impossible choice: skip [church]
22 service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory
23 quarantine, or some other enforcement action for practicing those sincere religious
24
25

26 ⁴ Federal courts have found discriminatory mask mandates, which prohibit
27 individuals from fully engaging in religious exercise, violate the First Amendment as
28 well. *See, e.g., Denver Bible Church v. Azar*, No. 1:20-cv-02362, 2020 WL 6128994,
*11 (D. Colo. Oct. 15, 2020).

1 beliefs.” *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky.
2 2020). The balance favors injunctive relief.

3 **B. The Public Interest Favors A TRO And Preliminary Injunction.**

4 The Governor continues to assert that the public interest cannot favor injunctive
5 relief because the COVID-19 pandemic is simply too risky to permit indoor religious
6 worship services at this time, and the Governor’s prohibitions on religious worship are
7 merely “temporary.” As the district court in Pennsylvania recently held, however,
8 “temporary” “deference cannot go on forever. **Faced with ongoing interventions of**
9 **indeterminate length, “suspension” of normal constitutional levels of scrutiny**
10 **may ultimately lead to the suspension of constitutional liberties themselves.”**
11 *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 55106990, *9 (W.D. Pa. Sept. 14,
12 2020) (emphasis added). This is precisely why the Supreme Court held, in *Catholic*
13 *Diocese*, that “even in a pandemic, the Constitution cannot be put away and forgotten,”
14 2020 WL 6948354, at *3, and “it has not been shown that granting the applications will
15 harm the public.” *Id.*

16 Indeed, “the public has a profound interest in men and women of faith
17 worshipping together [in person] in a manner consistent with their conscience.” *On*
18 *Fire Christian Ctr.*, 453 F. Supp. 3d at 914. Put simply, “**at this point and in this**
19 **place, the unexplained breadth of the ban on religious services, together with its**
20 **haven for numerous secular exceptions, cannot co-exist with a society that places**
21 **religious freedom in a place of honor in the Bill of Rights: the First Amendment.”**
22 *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (emphasis added).

23 The Governor’s “color-coded executive edicts” violate the cherished liberties
24 enshrined in the First Amendment, and the public has no interest – pandemic or not –
25
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1 from seeing the government enforce unconstitutional restrictions on Plaintiffs’
2 religious worship services. *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th
3 Cir. 2004). The injunction should issue.

4 **CONCLUSION**

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6 For the foregoing reasons, Plaintiffs respectfully request that this Court grant the
7 motion and issues a TRO and preliminary injunction restraining Governor Newsom
8 from enforcing his unconstitutional and discriminatory COVID-19 orders prohibiting
9 Plaintiffs’ religious worship services.

10 Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that on this 4th day of December, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS’ MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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

I declare under penalty of perjury under the laws of this State of California and the United States of America that the foregoing is true and correct and that this declaration was executed on December 4, 2020, at Lynchburg, Virginia.

Daniel J. Schmid
Declarant

/s/ Daniel J. Schmid
Signature

TABLE OF BLUEPRINT TIERS AND SELECTED SECTOR RESTRICTIONS

TIER 1	SECTOR/ACTIVITY	RESTRICTIONS
Widespread	Places of Worship: religious services in building	No indoor gathering; outdoor only
	Places of Worship: nonreligious social services in building	No building capacity or numerical limitation
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	50% capacity with no maximum
	Other Essential Retail ('big box' stores)	25% capacity with no maximum
	Shopping Centers (Malls, Destination Centers, Swap Meets)	25% capacity with no maximum
	Museums	Outdoor only
	Gyms and Fitness Centers	Outdoor only
	Family Entertainment Centers	Outdoor only
	Cardrooms, Satellite Wagering	Outdoor only

TIER 2	SECTOR/ACTIVITY	RESTRICTIONS
Substantial	Places of Worship: religious services in building	25% capacity or 100 people, whichever is fewer
	Places of Worship: nonreligious social services in building	No building capacity or numerical limitation
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	50% capacity with no maximum
	Other Essential Retail ('big box' stores)	50% capacity with no maximum
	Shopping Centers (Malls, Destination Centers, Swap Meets)	50% capacity with no maximum
	Museums	25% capacity with no maximum
	Gyms and Fitness Centers	10% capacity with no maximum
	Family Entertainment Centers	Outdoor only
	Cardrooms, Satellite Wagering	Outdoor only

TIER 3	SECTOR/ACTIVITY	RESTRICTIONS
Moderate	Places of Worship: religious services in building	50% capacity or 200 people, whichever is fewer
	Places of Worship: nonreligious social services in building	No building capacity or numerical limitation
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	No building capacity or numerical limitation
	Other Essential Retail ('big box' stores)	No building capacity or numerical limitation
	Shopping Centers (Malls, Destination Centers, Swap Meets)	No building capacity or numerical limitation
	Museums	50% capacity with no maximum
	Gyms and Fitness Centers	25% capacity with no maximum
	Family Entertainment Centers	25% capacity with no maximum
	Cardrooms, Satellite Wagering	25% capacity with no maximum

TIER 4	SECTOR/ACTIVITY	RESTRICTIONS
Minimal	Places of Worship: religious services in building	50% capacity with no maximum
	Places of Worship: nonreligious social services in building	No building capacity or numerical limitation
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	No building capacity or numerical limitation
	Other Essential Retail ('big box' stores)	No building capacity or numerical limitation
	Shopping Centers (Malls, Destination Centers, Swap Meets)	No building capacity or numerical limitation
	Museums	No building capacity or numerical limitation
	Gyms and Fitness Centers	50% capacity with no maximum
	Family Entertainment Centers	50% capacity with no maximum
	Cardrooms, Satellite Wagering	50% capacity with no maximum