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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

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

Plaintiffs,

v.

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

Defendant.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The Honorable Jesus G. Bernal
Hearing: December 18, 2020
2:00 PM PDT

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"The Supreme Court's recent decision in [Catholic Diocese] arguably represents a seismic shift in Free Exercise law, and compels the result in this case."[1]

INTRODUCTION

Following the seismic shift of the Supreme Court's *Catholic Diocese* decision, as recognized by the Ninth Circuit Court of Appeals in its 3-0 *Calvary Chapel* opinion—both of which are binding precedent on this Court—the Governor's continued defense of California's discriminatory COVID orders is now frivolous. The Governor absurdly contends that the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 2020 WL 6948354 (U.S. Nov. 25, 2020) [hereinafter *Catholic Diocese*], has no bearing on the instant matter and does not mandate strict scrutiny here, claiming "Plaintiffs do not even begin to show that *Roman Catholic Diocese* made such a sweeping change in the law." (Opposition to Motion for Temporary Restraining Order and Preliminary Injunction, dkt. 66 ("Opposition"), at 1.) The Governor argues that "Plaintiffs are wrong on both points" to argue that *Catholic Diocese* mandates the application of strict scrutiny here and that the Governor cannot satisfy that demanding test. (Opp'n 1.) **Fatal to the Governor's entire defense, however, the Ninth Circuit explicitly recognized that *Catholic Diocese* indeed represents a "seismic shift" in the law applicable to this litigation and all COVID-19 restrictions on religious gatherings**. *See Calvary Chapel*, 2020 WL 7350247, at *3 (emphasis added). The flimsy raft ferrying the Governor's discriminatory restrictions on Plaintiffs' religious worship services has been sunk by the tsunami of *Catholic Diocese* and *Calvary Chapel*. This Court's duty under these binding precedents is clear: immediately issue the injunction against the Governor's unconstitutional restrictions.

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[1] *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 7350247, *3 (9th Cir. Dec. 15, 2020) [hereinafter *Calvary Chapel*] (emphasis added).

LEGAL ARGUMENT

I. *CATHOLIC DIOCESE* AND THE NINTH CIRCUIT'S BINDING DECISION IN *CALVARY CHAPEL* MANDATE THE APPLICATION OF STRICT SCRUTINY TO THE GOVERNOR'S COLOR-CODED TIER RESTRICTIONS ON RELIGIOUS WORSHIP SERVICES AND THE ISSUANCE OF AN INJUNCTION.

A. The Governor's Total Prohibition on Religious Worship Services in Tier 1 Is Discriminatory and *Ipso Facto* Harsher Than New York's Limitation of Religious Services to 10 or 25, and Thus Mandates Strict Scrutiny under *Catholic Diocese* and *Calvary Chapel*.

As Plaintiffs demonstrated in their Motion, *Catholic Diocese* leaves no room to dispute that the Governor's total prohibitions on religious worship services mandate the issuance of injunctive relief. (Plaintiffs' Memorandum in Support of TRO and Preliminary Injunction, dkt. 58-1 (Plaintiffs' "Memorandum"), at 8–11.) Indeed, if restrictions on religious gatherings of 10 or 25 people are "far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required," *Catholic Diocese*, 2020 WL 6948354, at *2 (footnote omitted), then a **total prohibition** plainly fails the Supreme Court's test.

Lest there remain any doubt that *Catholic Diocese* mandates that this Court issue a preliminary injunction in the instant matter, the Ninth Circuit has now affirmatively imposed that obligation on this Court. In *Calvary Chapel*, the Ninth Circuit held that Nevada's COVID-19 restrictions on religious worship services could not survive *Catholic Diocese* and must be enjoined as violative of the First Amendment. 2020 WL 7350247, at *4 ("**The Supreme Court's decision in *Roman Catholic Diocese* compels us to reverse the district court**." (emphasis added)). Indeed,

> Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. **Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities.** As a result, the restrictions in the Directive, although not identical to New York's, require attendance limitations that create the same "disparate treatment" of religion. Because "disparate treatment" of religion

> triggers strict scrutiny review—as it did in *Roman Catholic Diocese*—we will review the restrictions in the Directive under strict scrutiny.

Id. (emphasis added) (citation omitted) (quoting *Catholic Diocese*, 2020 WL 6948354, at *2).

Notably, and fatally for the Governor here, the restriction on religious worship services in *Calvary Chapel* was **less restrictive** than the total prohibition here in Tier 1. *Compare id.* at *4 (noting that the Nevada restriction imposed a 50-person cap), *with* Mem. 4–5 (recognizing the Governor's current restriction as a complete prohibition in Tier 1).) Yet, the Ninth Circuit still held that "although less restrictive in some respects than the New York regulation reviewed in *Roman Catholic Diocese*—**is not narrowly tailored**." *Calvary Chapel*, 2020 WL 7350247, at *4 (emphasis added). Because the Nevada restrictions failed strict scrutiny, the Ninth Circuit reversed the district court's denial of injunctive relief and issued the requested preliminary injunction. *Id.*

As the binding decisions of *Catholic Diocese* and *Calvary Chapel* plainly demonstrate, there is only one constitutional conclusion here—the Governor's total prohibitions Plaintiffs' religious worship services violate the First Amendment. The preliminary injunction should issue immediately.

B. Binding Precedent from the Ninth Circuit in *Calvary Chapel* Mandates That This Court Issue the Injunction.

As the Ninth Circuit succinctly explained in *Calvary Chapel*,

> We respectfully join the Supreme Court in saying that members of our court "are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. **The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure."**

Calvary Chapel, 2020 WL 7350247, at *3 n.3 (emphasis added) (quoting *Catholic Diocese*, 2020 WL 6948354, at *3). And, though the district court had not considered the application of strict scrutiny mandated by *Catholic Diocese*, the Ninth Circuit exercised plenary review because the application of *Catholic Diocese* was "'a purely legal' question

where 'resolution of the issue is clear.'" *Calvary Chapel*, 2020 WL 7350247, at *4 (quoting *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986)). While exercising that plenary review, the Ninth Circuit held, **as a matter of law**, that "Calvary Chapel has demonstrated a likelihood of success on the merits of its Free Exercise Claim" because the restrictions were not the least restrictive means. *Id.* at *4.

As Plaintiffs noted in their filing after *Catholic Diocese* and the Supreme Court's Grant, Vacate, and Remand ("GVR") order in the instant case, **the only course of action is to immediately issue the temporary restraining order and preliminary injunction**. (Pls.' Notice, dkt. 59, at 4, ¶ 6.) As the Ninth Circuit just pronounced, application of *Catholic Diocese* to similar and discriminatory restrictions on religious worship services is a pure legal question resulting in only one conclusion: The Governor's total prohibitions on religious worship services in Tier 1 cannot withstand strict scrutiny and violate the First Amendment. This Court must issue the preliminary injunction immediately.

C. Contrary to the Governor's Contentions, *Catholic Diocese*'s Unequivocal Holding That Strict Scrutiny Is the Governing Standard Was Not Based on the Governor's Public Statements, and It Was Not Present in *Calvary Chapel* Where the Ninth Circuit Unequivocally Held That Strict Scrutiny Must Be Applied.

The Governor contends that *Catholic Diocese* is inapposite and the application of strict scrutiny unwarranted here because the Governor has not issued public statements threatening religious worship services or specifically targeted them for discriminatory treatment. (Opp'n 12–13.) The contention fails for several reasons: (1) the Supreme Court explicitly stated that its holding in *Catholic Diocese* did not hinge on the Governor's public statements, (2) no public statements targeting religious services were present in the Ninth Circuit's binding decision in *Calvary Chapel*, yet it still applied strict scrutiny under *Catholic Diocese*, and (3) it ignores the factual record and the Governor's Blueprint, which do target Plaintiffs' churches for discriminatory treatment.

First, contrary to the Governor's contentions that strict scrutiny is not warranted here because the Governor has not made public statements targeting religion, that was not the

basis for why strict scrutiny applied in *Catholic Diocese*. As the Court specifically stated: "**even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment**." 2020 WL 6948354, at *1 (emphasis added). Thus, the Governor's argument that he escapes constitutional condemnation under *Catholic Diocese* because he kept silent about his Blueprint's discrimination against religious worship is incorrect. Application of strict scrutiny is mandated here regardless of the fact that he did not make discriminatory statements publicly. The Blueprint, and its especially harsh treatment of religious worship services, speak for themselves.

Second, there is no mention of any public statements of the Nevada governor targeting religious gatherings in *Calvary Chapel*, but the Ninth Circuit still held that strict scrutiny was mandated by *Catholic Diocese* because, "[j]ust like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services." *Calvary Chapel*, 2020 WL 7350247, at *4. The same is true here, regardless of any lack of explicit threats from the Governor against Plaintiffs' churches.

Finally, as the record in the instant case makes plain: the Governor's Blueprint imposes discriminatory prohibitions on Plaintiffs' churches in Tier 1 (*see supra* Section I.A; Mem. Addendum, dkt. 58-1, at 1), and imposes discriminatory restrictions and numerical caps not imposed on similar nonreligious gatherings in Tiers 2 and 3. (*See infra* Section I.D; Mem. Addendum at 2–3.) Under both *Catholic Diocese* and *Calvary Chapel*, such discriminatory treatment of religious worship services is not neutral, is subject to strict scrutiny, and cannot survive it.

D. *Catholic Diocese* and *Calvary Chapel* Mandate the Application of Strict Scrutiny to the Discriminatory Restrictions on Religious Worship Services in Tiers 2 and 3.

In *Catholic Diocese*, the Supreme Court noted that the treatment afforded to other nonreligious gatherings or so-called "essential" businesses mandated the application of strict scrutiny. The Court explicitly mentioned numerous disparate treatments that are equally present here:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all **plants manufacturing chemicals and microelectronics and all transportation facilities**.

2020 WL 6948354, at *2 (emphasis added). Moreover, "[t]he disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." *Id.* In fact, much like here, "a large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id.* (cleaned up).

Justice Gorsuch elaborated further, explaining that while churches were limited to 10 or 25 people,

> the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include **hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too**. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians.

Id. at *4 (emphasis added) (Gorsuch, J., concurring). Indeed, under New York's COVID-19 restrictions, "People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops." *Id.*

Justice Kavanaugh similarly noted New York's disparate treatment, which is equally true here:

> New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. **In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all**.

Id. at *7 (emphasis added) (Kavanaugh, J., concurring).

The Ninth Circuit, too, was faced with many of the identical discriminatory restrictions at issue here, and found them to mandate strict scrutiny. "Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities." *Calvary Chapel*, 2020 WL 7350247, at *4.

1. The Governor's restrictions in Tier 1 single out religious worship services for especially harsh treatment, which mandates the application of strict scrutiny under *Catholic Diocese* and *Calvary Chapel*.

Here, the Blueprint imposes discriminatory prohibitions on Plaintiffs' churches that are not imposed on similar nonreligious businesses, and **many of the exempted businesses are precisely those discussed in *Catholic Diocese* and *Calvary Chapel***. As in *Catholic Diocese*, while Plaintiffs' churches in Tier 1 are totally prohibited from gathering in any number for indoor religious worship, food packaging and processing plants, laundromats, and warehouses are permitted to operate **with no numerical or capacity restrictions**. *Compare* Mem. 9 *with Catholic Diocese*, 2020 WL 6948354, at *4 (Gorsuch, J., concurring). Further, as was equally true in *Catholic Diocese*, Grocery Stores and liquor stores are allowed to operate at 50% capacity with no numerical cap, other "essential retail" at 25% capacity with no numerical cap, "Malls, Destination Centers, and Swap Meets" at 25% capacity with no numerical cap, and laundromats with no percentage or numerical cap, **yet Plaintiffs' churches are still prohibited from gathering with any number of individuals**. *Compare* Mem. 9 *with Catholic Diocese*, 2020 WL 6948354, at *4 (Gorsuch, J., concurring), and *id.* at *7 (Kavanaugh, J., concurring).

Catholic Diocese ticked off many comparators that received better treatment in the Red Zone where places of worship were limited to 10 persons, including: essential businesses (no restrictions), acupuncturists, camp grounds, garages, all plants manufacturing chemicals and microelectronics, and all transportation facilities. 2020 WL 6948354, at *2–3. Justice Gorsuch added to this list hardware stores, liquor stores, bicycle

repair shops, certain signage companies, accountants, lawyers, and insurance agents, and noted that people may gather inside for extended periods in bus stations, airports, laundromats, banks, hardware stores, and liquor shops. He noted that "[i]n recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples." *Id.* at *4 (Gorsuch, J., concurring). Justice Kavanaugh opined that caps on places of worship "do not apply to some secular buildings in the same neighborhoods." *Id.* at *7 (Kavanaugh, J., concurring). These include grocery stores, pet stores, or big box stores down the street. *Id.*

In the Orange Zone where 25 persons were permitted for worship, non-essential businesses could decide how many persons to admit, including "a large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day.'" *Id.* at *2–3. The court noted that "factories and schools have contributed to the spread of COVID–19, but they are treated less harshly." *Id.* at *2. Justice Kavanaugh stated that "Essential businesses and many non-essential businesses are subject to no attendance caps at all." *Id.* at *7 (Kavanaugh, J., concurring). He noted that the limits apply to places of worship no matter how large the facility. *Id.*

The Supreme Court thus endorsed Judge O'Scannlain's observation:

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

Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting).

The Governor asserts that Plaintiffs failed to "contend that California subjects worship services to especially harsh restrictions" and that comparisons to the nonreligious activities highlighted in *Catholic Diocese* are "notably absent" from Plaintiffs' Motion. (Opp'n 16.) This is absurd. Plaintiffs' Memorandum explains the especially harsh

treatment throughout, and highlights the same comparisons drawn from *Catholic Diocese* countless times. (*See* Mem. 8–13.)

In Tier 1, just as in *Catholic Diocese*, food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, big-box retail stores, malls, destination centers, transportation facilities, and many other so-called "essential" or "critical infrastructure" sectors are exempt from any numerical restriction or capacity limitation whatsoever, and others are subject to more favorable treatment than Plaintiffs' constitutionally protected religious services. (*See* Mem. Addendum at 1.)

2. The Governor's restrictions in Tier 2 single out religious worship services for especially harsh treatment, which mandates the application of strict scrutiny under *Catholic Diocese* and *Calvary Chapel*.

Similarly, in Tier 2, the discrimination present in *Catholic Diocese* is equally present here—**only worse**. Plaintiffs' churches may operate at 25% capacity or 100 individuals, whichever is fewer, but other gatherings are not subject to such restrictions or specific numerical limitation. (Mem. Addendum at 2.) Food packaging and processing, laundromats, and warehouses may continue to operate without capacity limitations or numerical caps. (*Id.*) Grocery Stores, "Essential Retail" (*e.g.*, Walmart, Lowe's, Home Depot, and other "big box" stores), liquors stores, Shopping Malls, Destination Centers, and Swap Meets may operate at 50% capacity but with no explicit numerical cap. (*Id.*) Museums may operate at 25% capacity but without an express numerical limit, and gyms may operate at 10% capacity with no numerical cap. (*Id.*) Ten percent of the capacity of Harvest Rock Church's 1,250-seat Pasadena campus is 125, and 25% is 312. (V. Compl. ¶ 120.)

Such discriminatory treatment warranted strict scrutiny and an injunction in *Catholic Diocese*, yet the Governor asserts it is inapplicable here. Such is not the law. *Compare* Mem. 11–12 *with Catholic Diocese*, 2020 WL 6948354, at *2 (majority opinion); *id.* at *7 (Kavanaugh, J., concurring) (noting the discrimination between religious services and "grocery store[s], pet store[s], or big-box store[s] down the street"). The Governor's

contention that his Blueprint does not impose especially harsh treatment on Plaintiffs' churches is simply wrong. And, the Ninth Circuit's binding decision in *Calvary Chapel*, not to mention *Catholic Diocese*, mandates the application of strict scrutiny and the issuance of a preliminary injunction against the Governor's similarly discriminatory restrictions in Tier 2. *See Calvary Chapel*, 2020 WL 7350247, at *3–4.

The Governor contends that houses of worship in Tier 2 are treated identically to museums, movie theatres, restaurants because all such gatherings are subject to "25% capacity or 100 persons." (Opp'n 6.) But, **this is simply false**. Houses of worship, such as Plaintiffs' churches can operate at 25% capacity or 100 people, **whichever is fewer**. (Mem. Addendum at 2.) However, the strict numerical cap is only imposed on Plaintiffs' religious worship services and does not apply other sectors. Food packaging, laundromats, and warehouses have no capacity or numerical limitation in Tier 2, grocery stores, big-box retail stores, shopping malls, destination centers, and swap meets can operate at 50% capacity with no strict numerical cap, and museums can operate at 25% capacity with no strict numerical cap. (*Id.*) So, despite the Governor's false contentions, Plaintiffs' churches are the only category in Tier 2 that has a numerical cap placed upon it. *Catholic Diocese* firmly holds that such disparate treatment requires the Governor to satisfy strict scrutiny, which he cannot. *Catholic Diocese*, 2020 WL 6948354, at *2.

3. The Governor's restrictions in Tier 3 single out religious worship services for especially harsh treatment, which mandates the application of strict scrutiny under *Catholic Diocese* and *Calvary Chapel*.

Tier 3 is no different, and its especially harsh treatment of religious worship services must be equally subject to strict scrutiny and immediately enjoined. In Tier 3, Plaintiffs may operate at 50% capacity or 200 people, whichever is fewer. (Mem. 12.) Food packaging and processing, laundromats, warehouses, grocery stores, "big box" stores, malls, destination centers, and swap meets may all operate with any capacity or numerical restriction of any kind. (Mem. Addendum at 3.) Museums are permitted 50% capacity but with no numerical limitation. (*Id.*) Gyms, fitness centers, family entertainment centers,

and cardrooms and satellite wagering centers may all operate at 25% capacity but with no numerical limitation. (*Id.*)

Yet again, such discriminatory treatment warranted strict scrutiny and an injunction in *Catholic Diocese*, as it does here. *Compare* Mem. 12 *with Catholic Diocese*, 2020 WL 6948354, *2 (majority opinion); *id.* at *7 (Kavanaugh, J., concurring) (noting the discrimination between religious services and "grocery store[s], pet store[s], or big-box store[s] down the street"). The Governor's contention that his Blueprint does not impose especially harsh treatment ON Plaintiffs' churches is simply wrong. And, the Ninth Circuit's binding decision in *Calvary Chapel*, not to mention *Catholic Diocese*, mandates the application of strict scrutiny and the issuance of a preliminary injunction against the Governor's similarly discriminatory restrictions in Tier 3. *See Calvary Chapel*, 2020 WL 7350247, at *3–4.

II. THE SUPREME COURT'S GVR ORDERS IN THIS CASE, *HIGH PLAINS HARVEST CHURCH*, AND *ROBINSON* MANDATE APPLICATION OF STRICT SCRUTINY UNDER THE NEW RULE ANNOUNCED IN *CATHOLIC DIOCESE*.

The Supreme Court's GVR order in the instant proceedings is indicative of the sea change that *Catholic Diocese* worked in the ever-expanding COVID-19 litigation challenging prohibitions and restrictions on religious gatherings. And, if further evidence of the Court's precedential shift was necessary, the Court's subsequent GVR orders in *Robinson v. Murphy*, 592 U.S. ___, 2020 WL 7346601 (U.S. Dec. 15, 2020), and in *High Plains Harvest Church v. Polis*, 592 U.S. ___, 2020 WL 7345850 (U.S. Dec. 15, 2020), demonstrate that the Supreme Court expects this Court and all lower courts to take its binding precedent in *Catholic Diocese* seriously. Notably, too, even the Ninth Circuit *sua sponte* vacated the Southern District of California's previous denial of injunctive relief in *South Bay United Pentecostal Church v. Newsom*, No. 20-55533, 2020 WL 7224194 (9th Cir. Dec. 8, 2020) in light of the sea change worked by *Catholic Diocese* and the Supreme Court's GVR order in this case. In both *High Plains* and *Robinson*, as in this case, the Supreme Court again faced discriminatory restrictions on religious worship services

where the lower court had denied review based upon the same deferential approach this Court took in its first order and, astoundingly, what the Governor still contends is warranted now. (Opp'n 21.) **In each of those cases, as it did in its GVR order here, the Court returned the matter to the lower court to apply the indisputable and binding holding of *Catholic Diocese*.**

Until *Catholic Diocese* was issued, courts throughout the country—including the Supreme Court itself—had issued conflicting rulings as to whether discriminatory treatment of religious gatherings as compared to so-called "essential" businesses was subject to strict scrutiny during a perceived emergency or pandemic. *Compare Catholic Diocese*, 2020 WL 694835, at *3–4; *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *and First Pentecostal Church v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020) (all holding that discriminatory restrictions on religious worship were subject to and could not survive strict scrutiny), *with South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020); *Harvest Rock Church*, 977 F.3d 728 (9th Cir. 2020); *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (all taking a more deferential approach and erroneously applying *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), to uphold discriminatory restrictions on religious gatherings during a perceived emergency).

Catholic Diocese, however, settled the debate. There, the High Court held unequivocally that COVID-19 restrictions, such as those at issue here, "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." 2020 WL 6948354, at *2. And, because they failed the test of neutrality, they were subject to strict scrutiny and could not survive it. *Id.* That decision worked a sea change in the manner in which COVID-19 restrictions (or, total prohibitions as those at issue here) must be scrutinized under the First Amendment. Indeed, as Justice Gorsuch noted: "It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is

no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Id.* at *7 (Gorsuch, J., concurring).

The Governor's only response to the clear import of *Catholic Diocese* to the instant matter is that the Supreme Court did not grant a similar injunction in Plaintiffs' appeal, but instead remanded to this Court for further consideration. (Opp'n 2.) But, the fact that the High Court did not grant an injunction is unremarkable in light of the sea change and new rule that this Court must follow from *Catholic Diocese*. In fact, GVR orders are common when the Supreme Court has issued an intervening decision that is dispositive of the Court's precedent to be applied in pending litigation. Indeed, that is the very purpose of a GVR order. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (noting that a GVR order "indicated that, in light of intervening developments, **there was a reasonable probability that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation**." (emphasis added)).

The practice of using GVR orders to resolve non-final litigation is based in judicial economy, and is a correct way to permit parties, such as Plaintiffs here, to obtain the necessary relief from the lower courts when the Supreme Court has issued a decision fundamentally altering the applicable precedent to issues active in current litigation. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("a GVR order conserves the scarce judicial resources of this Court that might otherwise be expended on plenary consideration [and] assists the court below by flagging a particular issue that does not appear to have been fully considered"). As the Supreme Court has acknowledged, "[a]s a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. **But we fulfill our judicial responsibility by instructing lower courts to apply the new rule retroactively to cases not yet final**." *Griffin v. Kentucky*, 479 U.S. 314, 326 (1987) (emphasis added). *See also Lawrence*, 516 U.S. at 167 (same).

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable

> probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence, 516 U.S. at 167.

The fact that the Court issued a GVR order in this instance does not change the fact that *Catholic Diocese* mandates the application of strict scrutiny in this case and a finding that the Governor's total prohibitions on Plaintiffs' religious worship services are unconstitutional under the First Amendment. (*See* Mem. 7–18.) The Supreme Court has issued to this and every other court a roadmap that leads to one destination—that the restrictions on churches and places of worship in California violate the First Amendment's Free Exercise Clause. Indeed, the restrictions in the case before this Court are worse than those enjoined in *Catholic Diocese*. The Supreme Court left no room for a different outcome based on some epidemiological opinion. The fact remains that the discriminatory treatment of places of worship in the Governor's orders, and particularly his Blueprint, must be enjoined. **There have now been four orders from the Supreme Court with one inescapable conclusion: the time for discrimination against religious worship services during COVID-19 has met its rightful end**. The injunction should issue immediately.

Unlike the Governor here, who continues to defend his unconstitutional regime despite the seismic shift that has transpired, the Colorado Governor in *High Plains Harvest Church v. Polis* got the message. After *Catholic Diocese* and the Court's GVR order in this case, the Colorado Governor lifted all restrictions on churches in Colorado and declared them to be essential businesses not subject to COVID-19 numerical or capacity limitations. Indeed, Justice Kagan specifically noted that the Colorado Governor did this in response to *Catholic Diocese*. *See High Plains*, 2020 WL 7345850, at *1 (Kagan, J., dissenting) (noting that "Colorado has lifted all those limits [on worship services]" and "explained that it took that action in response to this Court's recent decision [*Catholic Diocese*].")

Additionally, in *Father Trevor Burfitt v. Newsom*, No. BCV-20-102267 (Ca. Superior Ct. Dec. 10, 2020) (a copy of which is attached hereto as EXHIBIT A), the California Superior Court for Kern County noted that *Catholic Diocese* and the GVR order in this case "provide clear guidance on these issues." (Ex. A at 1.) Indeed, the court in *Burfitt* found that the Tier 1 discriminatory restrictions on religious worship services (as well as those in Tiers 2 and 3) were not neutral or generally applicable and were subject to strict scrutiny under *Catholic Diocese*, and that the Governor's discriminatory treatment of religious worship violated the First Amendment. (Ex. A at 2.) It therefore issued the preliminary injunction.

III. THE GOVERNOR'S COLOR-CODED EXECUTIVE EDICTS IMPOSING DISCRIMINATORY PROHIBITIONS AND RESTRICTIONS ON RELIGIOUS WORSHIP SERVICES CANNOT SURVIVE STRICT SCRUTINY.

A. The Governor's Continued Reliance On The Expired Lone Concurrence Of Chief Justice Roberts In *South Bay* Was Precisely What *Catholic Diocese* Rejected And Why It Vacated This Court's Previous Denial Of Injunctive Relief.

Despite the clear holding of *Catholic Diocese*, the GVR orders in this case, *High Plains*, and *Robinson*, and the Ninth Circuit's order in *Calvary Chapel*, the Governor continues to argue that his never-ending restrictions on religious worship services are entitled to deference. (Opp'n 20–21 (arguing that the "restrictions should be reviewed deferentially").) His only support for such a contention—which plainly ignores the substantial jurisprudential developments in COVID-19 litigation—is Chief Justice Robert's lone concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). Astoundingly, the Governor contends that "[n]othing in *Roman Catholic Diocese* intends to depart from this [deferential approach]." (Opp'n 21.) This is simply absurd. *Catholic Diocese* explicitly and unequivocally rejected the notion that unending deference is due here.

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area.

> **But even in a pandemic, the Constitution cannot be put away and forgotten.** The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, **we have a duty to conduct a serious examination of the need for such a drastic measure.**

2020 WL 6948354, at *3 (emphasis added). Courts reviewing similar arguments post-*Catholic Diocese* have recognized that *Catholic Diocese* explicitly disavowed the application of the Governor's preferred deference. *See, e.g.*, *Am. Coll. of Obstetricians & Gynecologists*, No. TDC-20-1320, 2020 WL 7240396, at *12 (D. Md. Dec. 9, 2020) ("Moreover, the Supreme Court recently recognized the limits of deference when it states that although judges 'are not public health experts' and 'should respect the judgment of those with special expertise,' 'even in a pandemic, the Constitution cannot be put away and forgotten.'" (quoting *Catholic Diocese*, 2020 WL 6948354, at *3)).

And, as the binding precedent of *Calvary Chapel* dictates, both this Court's and the Governor's reliance on Chief Justice's Roberts's concurrence in *South Bay* was misplaced, and certainly incorrect as a matter of law now. *See Calvary Chapel*, 7350247, at *2 (reversing the district court's denial of injunctive relief because it "relied heavily on Chief Justice Roberts's concurrence in [*South Bay*]"). Moreover, the Ninth Circuit's binding decision in *Calvary Chapel* explicitly rejected the application of the very deference the Governor requests here. There, much like the Governor here, Nevada argued that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), "provides the proper framework governing a state's authority during a public health crisis." *Calvary Chapel*, 2020 WL 7350247, at *2, as did the district court in that matter. The Ninth Circuit stated plainly, "We reverse." *Id.*

Contra the Governor's contentions, Justice Gorsuch noted the Supreme Court's rejection of the Governor's desired deference. Indeed, in discussing the precise concurrence the Governor relies upon here, he noted that the Chief Justice

> expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, **that rationale has expired according to its own terms**. Even if the Constitution has taken a

> holiday during this pandemic, it cannot become a sabbatical. **Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.**

2020 WL 6948354, at *5 (Gorsuch, J., concurring) (emphasis added) (citation omitted).

The Governor attempts to mask his expired rationale for deference by claiming that "a majority of the Supreme Court" agrees that deference is due here. (Opp'n 21, n.8.) That contention defies explanation. Leaving aside the fact that a clear majority of the Court explicitly rejected that rationale of deference in *Catholic Diocese*, 2020 WL 6948354, at *3, as Justice Gorsuch noted, "[t]ellingly no Justice now disputes any of these points. **Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic**." *Id.* at *6 (Gorsuch, J., concurring) (emphasis added). Indeed,

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

Id. (emphasis added).

To support his specious contention that *Catholic Diocese* actually supports a finding of deference for the Governor here, the Governor selectively pulls from the concurrence of Justice Kavanaugh. (Opp'n 21 n.8.) But, the Governor completely omits the conclusion of the concurrence. Though Justice Kavanaugh noted that deference is due in **some** instances, he explained it is substantially diminished where—as here—cherished constitutional liberties are at stake. *Catholic Diocese*, 2020 WL 6948354, at *8 ("But judicial deference in an emergency or a crisis **does not mean wholesale judicial abdication**, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised." (emphasis added)).

What makes the Governor's continued reliance on Chief Justice Roberts' concurrence in *South Bay* all the more frivolous is that even the Chief Justice now rejects the deference in perpetuity that the Governor continues to assert. *See id.* at *6 (Gorsuch, J., concurring)

("[T]oday, the author of the *South Bay* concurrence even downplays the relevance of *Jacobson* for cases like the one before us."); *id.* at *9 (Roberts, C.J., dissenting) ("Numerical capacity limits of 10 and 25 people . . . do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause."); *id.* ("the challenged restrictions raise serious concerns under the Constitution"). If the Chief Justice has now asserted that unduly restrictive limits on religious worship services violate the Constitution—even in times of a pandemic—then the Governor's continued reliance on the expired and non-precedential concurrence that has now been disavowed by the majority opinion in *Catholic Diocese* cannot be countenanced.

B. *Catholic Diocese* Demands a Finding That the Governor's Color-Coded Directives Imposing Total Prohibitions and Discriminatory Restrictions on Religious Worship Services Are Not the Least Restrictive Means.

Because the Governor's color-coded executive edicts target Plaintiffs' churches for especially harsh treatment and impose discriminatory prohibitions and restrictions on them that are not imposed on similarly situated nonreligious gatherings, *Catholic Diocese* mandates that the Governor satisfy strict scrutiny and demonstrate that his orders are the least restrictive means. *See Catholic Diocese*, 2020 WL 6948354, at *3. This requires the Governor to satisfy "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.

And, despite his constant refrain that deference is due him, strict scrutiny mandates that the Governor alone bears the burden to demonstrate his Blueprint restrictions are the least restrictive means. 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, **[Plaintiffs] must be deemed likely to prevail unless the Government has shown** that

[their] proposed less restrictive alternatives are less effective than [the orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

Catholic Diocese demonstrates that the Governor cannot satisfy this burden. There, the Court unequivocally held that restrictions on religious worship services of 10 or 25 people are not narrowly tailored or the least restrictive means. *See* 2020 WL 6948354, at *2 ("**it is hard to see how the challenged regulations can be regarded as 'narrowly tailored**'" (emphasis added)). In fact, it held that restrictions on religious worship services of 10 or 25 people "are **far more restrictive** than any COVID–related regulations that have previously come before the Court, **much tighter** than those adopted by many other jurisdictions hard-hit by the pandemic, and **far more severe** than has been shown to be required to prevent the spread of the virus at the applicants' services." *Id.* (emphasis added).

Here, the Tier 1 restrictions—**which impose a total prohibition on all religious worship services for 99.1% of the California population and the vast majority of all of Plaintiffs' churches**—are even more restrictive, much tighter, and more severe than those found not narrowly tailored in *Catholic Diocese*. (*See* Mem. 4.) If restrictions of 10 and 25 people are not narrowly tailored, then an absolute prohibition on any religious gatherings plainly fails the test. The same is true of Tier 2 where only houses of worship are subject to a strict numerical cap of the fewer of 25% or 100 while food packaging, laundromats, and warehouses have no capacity or numerical limit, grocery stores, liquor stores, big-box retail stores, shopping malls, and others are subject only to a 50% capacity limit with no numerical limit, and museums have a 25% capacity limit but no numerical limit. (Mem. Addendum at 2.) The same is true of Tier 3 where only houses of worship are subject to a strict numerical cap of the fewer of 50% or 200 while food packaging, laundromats, warehouses grocery stores, liquor stores, big-box retail stores, shopping malls, lawyers, accountants, destination centers, swap meets and others have no numerical and capacity limitations no numerical limit, museums have a 50% capacity limit but no

numerical limit, and gyms, fitness centers, family entertainment centers, and cardrooms all have a 25% capacity restriction but numerical cap. (Mem. Addendum at 3.)

IV. THE GOVERNOR ADMITS, AS HE MUST, THAT PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF, AND *CATHOLIC DIOCESE* MANDATES THE SAME CONCLUSION.

There is no dispute that the Governor's prohibition and restrictions on religious worship services impose irreparable injury on Plaintiffs' religious exercise. Indeed, the Governor concedes the point. (Opp'n 23–24 ("The State agrees that Plaintiffs have a constitutionally protected interest in participating in indoor worship services and . . . **they suffer some irreparable injury when prevented from attending services in person**." (emphasis added).) Nor could the Governor dispute such irreparable harm under the binding precedent of *Catholic Diocese*. "There can be no question that the challenged restrictions, if enforced, will cause irreparable harm." 2020 WL 6948354, *3.

> If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

Id.

The same is equally true of Plaintiffs' churches. Plaintiffs' churches have and exercise a sincere religious belief that failure to abide by Scripture's command that it gather its congregants together to worship the Lord is disobedience to the Lord for which its pastors will be held divinely accountable. (V. Compl., dkt. 1, ¶¶ 49, 57.) Plaintiffs' churches have and exercise sincere religious beliefs that they must adhere to all scriptural commands, and that failure to do so will result in the strictest of divine judgment for their pastors and leaders. (V. Compl. ¶¶ 50, 58 (citing *Hebrews* 3:17; *James* 3:1).) Plaintiffs' churches believe that Scripture compels them to gather together in person for religious worship and that they are not to forsake the assembling of themselves together. (V. Compl. ¶ 65 (citing *Hebrews* 10:25).) And Plaintiffs' churches all have sincerely held religious beliefs that they are to sing to the Lord in the congregation of believers. (V. Compl. ¶¶ 59–64 (citing

Psalm 96:1–2, *Psalm* 95:1, *Psalm* 104:33, *Hebrews* 2:12, *Psalm* 59:16, *Psalm* 33:3).) Not one of these sincerely held religious beliefs can be exercised in Plaintiffs' churches while the Governor's total prohibition on religious worship is imposed upon them in Tier 1—which is the vast majority of Plaintiffs' churches.

Not only that, but where enforcement was merely theoretical in *Catholic Diocese*, Plaintiffs have actually received letters from government prosecutors threatening daily criminal penalties, fines, imprisonment, and closure of their churches. (Mem. 18–20.) Irreparable injury is clearly present here—as the Governor readily concedes—and the injunction should issue immediately.

Catholic Diocese found irreparable harm inherent where "[t]hirteen days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago." 2020 WL 6948354, at *3. "It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions." *Id.* at *6 (Gorsuch, J., concurring). That delay—**which for Plaintiffs' churches has been since July 18**—was found to be itself irreparable injury. If 13 days and 7 days of delay while unconstitutional restrictions are placed on religious worship is enough for irreparable harm, then there is no question that it is present here where Plaintiffs have been fighting for months to get relief.

V. *CATHOLIC DIOCESE* ALSO DEMANDS A FINDING THAT THE PUBLIC INTEREST FAVORS INJUNCTIVE RELIEF HERE.

The Governor also contends that the public interest does not favor injunctive relief here because COVID-19 is too risky for injunctive relief. (Opp'n 24–25.) This contention yet again flies in the face of the binding precedent in *Catholic Diocese*. There, as is equally true here, the Court unequivocally held that "it has not been shown that granting the applications will harm the public." *Catholic Diocese*, 2020 WL 6948354, at *3. The reason for that was two-fold: (1) "the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease," *id.*, and (2) "the State has not shown that public health would be imperiled if less restrictive measures were

imposed." *Id.* Both scenarios are equally true of Plaintiffs' churches. Plaintiffs have numerous churches in dozens of locales throughout California, which are subject to unconstitutional restrictions every day. (Third Declaration of Che Ahn, attached hereto as EXHIBIT B, ¶¶ 3–4.) This Court must issue a preliminary injunction, and it must be statewide to cover all of Plaintiffs' churches and afford them the relief needed.

A. The Governor's Failure to Produce Any Evidence That an Outbreak Has Been Linked to Plaintiffs' Churches Is Fatal to His Contentions Under *Catholic Diocese*.

In attempting to escape the unavoidable conclusion that *Catholic Diocese* mandates in this matter, the Governor contends that *Catholic Diocese*'s conclusion that no outbreaks were reported from the applicant churches is not true here. (Opp'n 21–22.) Balderdash. In fact, the Governor contends that while "the same can surely be said of many congregations in California, it cannot be said of Plaintiffs." (Opp'n 22.) But, notably absent from the Governor's Opposition or in any of the mountains of pages of irrelevant declarations he submitted **is any mention that a single outbreak of COVID-19 (or even a positive case, for that matter) has been linked to Plaintiffs' churches**.

In fact, not one of the declarations submitted by the Governor in this matter contains anything more than generalities about the purported risk of worship services. (*See generally* (Watt Declaration, dkt. 66-1, at 15–17); Rutherford Declaration, dkt 66-2, at 33–35); (Stoto Declaration, dkt. 66-3, at 18–19).) Thus, despite claiming that Plaintiffs' churches and religious worship services pose the grave danger of the spread of COVID-19, and **though it is the Governor's burden to demonstrate satisfaction of strict scrutiny**, the Governor has not and cannot produce one shred of evidence linking Plaintiffs' churches and their worship services to the spread of COVID-19. The reason for this is simple, much like in *Catholic Diocese*: there is no evidence "that attendance at [Plaintiffs'] services has resulted in the spread of the disease." *Catholic Diocese*, 2020 WL 6948354, at *3.

Moreover, as the sworn testimony before this Court plainly indicates, Plaintiffs' churches have not had any incidence of the spread of COVID-19 or even reports of any

specific cases of COVID-19 in their congregations resulting from attendance at religious worship services. That lack of evidence is fatal to the Governor's contentions here, and generalized hypotheses about the purported risk of religious worship services is not enough to overcome *Catholic Diocese*. Indeed, not one of the purported hypotheses was unknown by the scientific and governmental communities at the time *Catholic Diocese* was decided. In fact, the precise arguments made by the Governor here and purportedly supported by his three declarants were made to the Supreme Court in *Catholic Diocese*, relied upon by the dissent, and explicitly rejected by the majority as a sufficient basis to justify discriminatory restrictions on religious worship services that were more lenient than those at issue here. *See, e.g.*, *Catholic Diocese*, 2020 WL 6948354, at *11 (Breyer, J., dissenting) (noting that "members of the scientific and medical communities tell us that the virus is transmitted" more easily in gatherings with features of religious worship services); *id.* at *12 (Sotomayor, J., dissenting) (noting that "medical experts tell us . . . large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time" pose a greater risk of spreading COVID-19 than other gatherings); *id.* ("'Epidemiologists and physicians generally agree that religious services are among the riskiest activities'" (citing amicus brief)).

Thus, it is not as though the Governor is presenting some novel theory heretofore unknown to COVID-19 litigation or that somehow escaped the minds of the Justices in *Catholic Diocese*. The Governor is merely presenting the same so-called expert testimony to attempt to justify his unconstitutional prohibitions on Plaintiffs' religious worship services. When presented with the same theories and scientific testimony as that presented here, the Supreme Court unequivocally held that the applicants "have clearly established their entitlement to relief" and "have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Id.* at *1. Repackaging the same scientific testimony already rejected as insufficient justification for imposing discriminatory

restrictions on religious worship services fails to overcome the binding precedent of *Catholic Diocese*.

B. The Undisputed Record In The Instant Matter Demonstrates That Plaintiffs' Churches Are Engaging In And Continue To Engage In Social Distancing And Personal Hygiene Protocols.

The *Catholic Diocese* Court found it relevant that the applicant diocese "had been constantly ahead of the curve, enforcing stricter safety protocols than the State required," and that the applicant synagogue "rigorously implemented and adhered to all health protocols." 2020 WL 6948354, at *2. The uncontroverted sworn testimony before this Court establishes that Plaintiffs' churches are likewise adhering to social distancing, engaging in enhanced sanitization, and implementing other mechanisms to protect their congregants. Indeed, Plaintiff Harvest Rock Church, at all of its campuses, "has been allowing for worship services only the number of people that allows for effective social distancing," "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." (V. Compl. ¶¶ 120–123; 3d Ahn Decl. ¶ 5.) Moreover, Plaintiff Harvest Rock Church, at all of its campuses, "has its building and restrooms professionally sanitized after hosting each worship service." (V. Compl. ¶¶ 120–123; 3d Ahn Decl. ¶ 5.) Plaintiff Harvest International Ministry's member churches in California take the same precautions. (V. Compl. ¶ 124; 3d Ahn Decl. ¶ 6.)

The only response the Governor can muster to the sworn, unrebutted testimony before this Court is a letter from the Office of City Attorney/City Prosecutor of the City of Pasadena **alleging** that Plaintiff Harvest Rock was hosting an indoor worship service and not complying with social distancing. (Opp'n 22.) What the letter makes clear, however, is that the City Prosecutor had no firsthand knowledge of anything that was occurring at Harvest Rock and was merely alleging that some violations had occurred. (Dkt. 45-2 at 1 (noting only that "[i]t has come to our attention," "we have information," "[i]t was also noted," and other speculative statements).) What is clear from the City Prosecutor's letter is that it did not conduct any investigation into Harvest Rock Church, did not attend the

allegedly offending worship service, and had no firsthand information whatsoever. "[U]nsubstantiated allegations" "are not evidence," *Cangress v. City of L.A.*, No. 14-CV-1743-SVW-MAN, 2016 WL 5946878, *9 (C.D. Cal. Mar. 22, 2016), and neither are "unsupported conjecture or conclusory statements." *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). The Governor's reliance on such allegations cannot therefore overcome the sworn testimony before the Court demonstrating Plaintiffs' compliance with social distancing and hygiene procedures found significant by *Catholic Diocese*.[2]

C. The Public Interest Is Also Present Because Studies Demonstrate That Unending Lockdowns Are Increasing Isolation, Despair, and Suicide, and Only Those Attending Church Have Been Found to Avoid Mental Health Decline.

As the Centers for Disease Control and Prevention (CDC) has reported, COVID-19 and the unending isolation caused by continuous lockdowns and restrictions on gatherings have resulted "[s]ymptoms of anxiety disorder and depressive disorder increas[ing] considerably." *See Mental Health, Substance Abuse, and Suicidal Ideation During the COVID-19 Pandemic—United States, June 24–30, 2020*, CDC (Aug. 14, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf. Over 40% of those surveyed "reported at least one adverse mental or behavioral health condition" because of the isolation caused by lockdowns and gathering restrictions. *Id.* at 1. In fact, **25% of young adults, ages 18–24 "reported having seriously considered suicide in the 30 days before completing the survey**." *Id.* (emphasis added). And, among that same age group, **74.9% reported "[a]t least one adverse mental or behavioral symptom**." *Id.* at 2 (emphasis added). The decline in mental health and rise in substance abuse and suicidal ideation, however, was reported in all age groups.

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[2] To be sure, the Governor also relies upon the speculation of a news report to suggest Plaintiffs are not complying with social distancing. (Opp'n 22.) But, as a matter of law, such media reports are "not evidence at all." *Thompson v. Woodford*, 619 F. Supp. 2d 1028, 1053 (S.D. Cal. 2007).

Yet, at the same time, a Gallop Survey conducted on the mental health of Americans found that **those who frequently attend religious worship services were the only group identified that did not experience a significant reduction in overall mental health rating**. *See Americans Mental Health Ratings Sink to New Low*, Gallup (Dec. 7, 2020), https://news.gallup.com/poll/327311/americans-mental-health-ratings-sink-new-low.aspx. If frequent Church attendance has a positive correlation to mental health and well-being during the COVID-19 era, which it does, then the public interest favors less restrictions on the constitutionally protected right to religious worship. *Catholic Diocese*, *Calvary Chapel*, and the First Amendment all demand an injunction.

CONCLUSION

For the foregoing reasons, and for those given in *Catholic Diocese* and *Calvary Chapel*, and in Plaintiffs' original Memorandum (dkt. 58-1), this Court's duty is clear: the preliminary injunction should issue immediately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that on this 16th day of December, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIOIN

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 16, 2020, at Lynchburg, Virginia.

Daniel J. Schmid
Declarant

/s/ Daniel J. Schmid
Signature