No. 20-56357

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs–Appellants

v.

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

Defendant–Appellee

On Appeal from the United States District Court
for the Central District of California (Los Angeles)
In Case No. 2:20-cv-06414-JCB-KK before the Honorable Jesus G. Bernal

PLAINTIFFS–APPELLANTS' SUPPLEMENTAL BRIEF

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs–Appellants, Harvest Rock Church, Inc. and Harvest International Ministry, Inc., state they are domestic nonprofit corporations incorporated under the laws of the State of California, neither has a parent corporation, and neither issues stock.

Dated: December 31, 2020

/s/ Daniel J. Schmid

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I. THE L.A. COUNTY PUBLIC HEALTH ORDER DOES NOT SUPERSEDE THE GOVERNOR'S ORDERS AND DOES NOTHING TO ELIMINATE THE IRREPARABLE HARM BEING IMPOSED ON APPELLANTS EACH DAY.

A. The L.A. County Order Gives Appellants No Relief Because the More Restrictive Provisions of the State's Orders Control.

The May 7 State Public Health Order and the December 3 L.A. County Order both recognize that counties in California may impose more restrictive health measures but may not impose health measures less restrictive than the State's Orders. As the L.A. County Order explicitly states, "**County Health Officer Orders may not be less restrictive than Orders issued by the State Public Health Officer**." (Dist. Ct. dkt. 74-1, L.A. County Order, at 1 (emphasis added).) It also notes that, consistent with the Governor's Orders, "local jurisdictions may implement or continue **more restrictive** public health measures in the jurisdiction if the local health officer believes conditions in that jurisdiction warrant them." (L.A. County Order at 3 (emphasis added).) The May 7 Public Health Order also explicitly notes that "a local health jurisdiction may implement or continue **more restrictive** public health measures if the jurisdiction's Local Health Officer believes conditions in that jurisdiction warrant it." (9th Cir. dkt. 3-5 at 136 (emphasis added).) It also notes that some jurisdictions would be permitted to reopen certain sectors more quickly than the State as a whole but may only do so if the State Public Health

Officer and Director "deem[s] it to be in the interest of public health and safety." (9th Cir. dkt. 3-5 at 137.) None of that has happened in L.A. County, and thus its order provides no refuge from the State for religious worship services in the County.

Thus, despite L.A. County's admirable desire to comply with the Supreme Court's clear teaching in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) [hereinafter *Catholic Diocese*], a teaching the Governor continues to ignore to this day, the County's efforts to abide by *Catholic Diocese* have no operative effect for Appellants' Churches in L.A. County or anywhere else. Simply put, though the L.A. County Order purports to establish an exception for religious worship services (Dist. Ct. dkt. 74-1, L.A. County Order, at 3-4), the Governor's Orders still completely prohibit all indoor religious worship services for 99.9% of California under both the Regional Stay-At-Home Order and the Blueprint. The Governor's orders remain in effect, supersede the L.A. County Order, still prohibit the worship services and religious exercise of Appellants, and still violate the First Amendment.

B. Appellant Harvest Rock Church Is Still Suffering Immediate and Irreparable Harm Every Day From the City of Pasadena's Threat of Criminal Sanctions Under the Governor's Orders.

Even if the L.A. County Order could supersede the Governor's total prohibitions on religious worship services in the County, which it cannot, and even if it somehow provided some relief for Appellants' churches in L.A. County, which

it does not, the L.A. County Order still provides no relief whatsoever to Harvest Rock Church's main church campus in the City of Pasadena. The L.A. County Order explicitly **excludes** Pasadena from the exemptions outlined in the superficial Order. "The Revised Temporary Order is effective within the County of Los Angeles Public Health Jurisdiction, defined as cities and unincorporated areas within the County of Los Angeles, **with the exception of the cities of Long Beach and Pasadena that must follow their respective City Health Officer orders and guidance**." (Dist. Ct. dkt. 74-1 at 2 (emphasis added).)

As demonstrated in the Verified Complaint (9th Cir. dkt. 3-5), Harvest Rock Church has its principal place of business and main church campus in the City of Pasadena. (9th Cir. dkt. 3-5, V. Compl. ¶¶ 40, 48.) And, as the record in the instant matter reveals, it is the City of Pasadena (Criminal Prosecutor and Public Health Department)—under the color of the Governor's Orders—that has explicitly threatened Harvest Rock Church with criminal sanctions for alleged violations of the Governor's Orders. (9th Cir. dkt. 3-7 at 9 (noting that violations of the Governor's Orders are "criminal in nature" and that "[e]ach day is a separate violation and carries with it a potential of up to one year in jail and a fine for each violation").) Moreover, it is not just Harvest Rock Church that has been threatened with criminal penalties and daily fines, **it is also every pastor, staff member, visitor, and parishioner**. (*Id.* ("Any violations in the future will subject your

Church, owners, administrators, operators, staff, and parishioners to the above-mentioned criminal penalties as well as the potential closure of your Church.").)

As the Supreme Court said in *Catholic Diocese*, "**[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm**." 141 S. Ct. at 67 (emphasis added). Here, despite the L.A. County Order's admirable aims at eliminating unconstitutional restrictions on religious worship services, Appellants still suffer the threat of unconstitutional enforcement each day from both the Governor's Orders and the City of Pasadena's rogue efforts at suppressing religious worship. That was unquestionably irreparable harm in *Catholic Diocese*, and it is unquestionably irreparable harm here. The Governor's Orders and his Blueprint must be enjoined.

C. Appellants Have Member Churches in 31 Localities Inside L.A. County and in 44 Localities in 17 Other California Counties.

Appellant Harvest International Ministry is an association of churches, with member churches and ministries located all across California. (9th Cir. dkt. 3-8, Third Declaration of Che Ahn, ¶ 4.) Within L.A. County, Appellant Harvest International Ministry has member churches and ministries in the following 31 localities: Agoura Hills, Altadena, Avalon, Azusa, Claremont, Duarte, Eagle Rock, Glendale, La Crescenta, Lakewood, Lomita, Los Angeles, Manhattan Beach, Monrovia, North Hollywood, Northridge, Pasadena, San Gabriel, Santa Monica, Sherman Oaks, Stevenson Ranch, Studio City, Sunland, Temple City, Torrance, Van

Nuys, Walnut, West Covina, West Hills, West Hollywood, and Winnetka. (*Id.*) Appellant Harvest Rock Church has its main campus inside L.A. County in Pasadena and one of its satellite campuses in downtown Los Angeles. (*Id.* at ¶ 3.) As discussed *supra*, even these numerous churches and campuses within L.A. County are still subject to criminal sanction for violating the Governor's Orders despite the L.A. County Order.

Additionally, Appellants have numerous churches and campuses outside of L.A. County that are also still suffering irreparable injury each day the Governor's Orders remain in place. Appellant Harvest International Ministry has member churches and ministries in 44 different localities spread among the following 17 counties: Alameda County, Contra Costa County, Humbolt County, Kern County, Madera County, Orange County, Placer County, Riverside County, Sacramento County, San Bernardino County, San Diego County, San Joaquin County, Santa Barbera County, Shasta County, Sonoma County, Sutter County, and Ventura County. (*Id.* at ¶ 4.) And Appellant Harvest Rock Church has satellite campuses in both Riverside County and Santa Ana County. (*Id.* at ¶ 3.)

Appellants continue to suffer irreparable harm from the Governor's Orders. Without the same level of criminal sanctions threatened here, the Supreme Court in *Catholic Diocese*, this Court in *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16119, 2020 WL 7350247 (9th Cir. Dec. 15, 2020), and the Second Circuit in

Agudath Israel of Am. v. Cuomo, No. 20-3572, 2020 WL 7691715 (2d Cir. Dec. 28, 2020), found irreparable harm. How much more here with even more severe restrictions and penalties? "**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**." *Catholic Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring) (emphasis added).

And, even if the L.A. County Order could somehow be considered as potentially mooting claims for **some** of Appellants' churches, which it does not, it would fall within the exceptions from mootness as a number of courts have held. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 68 (holding that even though the classifications had changed, "[i]t is clear that this matter is not moot" because "applicants remain under a constant threat that the area in question will be reclassified"); *Calvary Chapel Dayton Valley*, 2020 WL 7350247, at *1 n.1 (holding that Ninth Circuit must reach merits of COVID-19 challenge when the Governor "could restore the Directive's restrictions just as easily as he replaced them"); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345 (7th Cir. 2020) (merits of COVID-19 restrictions on churches not moot because Governor could reinstitute them at any time).

II. THE L.A. COUNTY ORDER RECOGNIZES THAT *CATHOLIC DIOCESE* COMPELS A FINDING THAT THE GOVERNOR'S ORDERS ARE NOT NARROWLY TAILORED.

Though it provides no relief to Appellants, the L.A. County Order is instructive as a demonstration that less restrictive alternatives are available to the Governor than his total prohibition on indoor religious worship services under Tier 1 and the Regional Stay-At-Home Order and his discriminatory numerical caps imposed only on churches in Tiers 2–4. In its Press Statement released the same day the L.A. County Order was issued, L.A. County explicitly stated why it was removing the restrictions on indoor religious worship services in its own orders: "The Los Angeles County Health Officer Order **will be modified today to align with recent Supreme Court rulings for places of worship**." (Dist. Ct. dkt. 74-1 at 20 (emphasis added).) The L.A. County Order lists the Supreme Court opinions to which the Press Statement refers: "Roman Catholic Diocese of Brooklyn v. Cuomo, [141 S. Ct. 63 (2020)] (per curiam); Robinson et al. v. Murphy, 592 U.S. ___ (2020), and High Plains Harvest Church, et al. v. Polis, 592 U.S. ___ (2020)." (*Id.* at 4 n.1.) To align with those decisions, the L.A. County Order states that it must permit Churches to host religious worship services indoors, subject only to social distancing limitations and face coverings. (*Id.* at 14.) At minimum, this demonstrates that the Governor could—if he followed Supreme Court precedent—enact less restrictive

alternatives that satisfy the constitutionally required least restrictive means test, but he has not.

In *Catholic Diocese*, the Court noted that restrictions of 10 and 25, depending on the appropriate tier, were "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." 141 S. Ct. at 67 (footnote omitted). Because of that, "it is hard to see how the challenged regulations can be regarded as 'narrowly tailored,'" because "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Id.* And, as demonstrated in Appellants' Emergency Motion (9th Cir. dkt. 3-1), the Governor's Orders and the Blueprint impose a **total prohibition on indoor religious worship services for 99.9% of California, including nearly all of Appellants' churches**. (9th Cir. dkt. 3-1 at 7-16.)

In *Calvary Chapel Dayton Valley*, this Court was presented with a less restrictive regulation than that at issue in *Catholic Diocese* (and much less restrictive than at issue here), and still enjoined it as failing the narrow tailoring analysis. 2020 WL 7350247, at *4. There, Nevada's restriction placed a strict 50-person cap on religious worship services that was not imposed on other secular businesses

including "[c]asinos, bowling alleys, retail businesses, arcades, and other similar secular entities" that only had a percentage cap but no strict numerical limit. *Id.* This Court held that "although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*," the 50-person numerical cap was not narrowly tailored because it failed to treat religious worship services the same as other secular businesses. *Id.*

The Second Circuit held that *Catholic Diocese* mandates a finding that "fixed capacity limits" of 10 and 25 people (more like the Governor's strict numerical caps at issue here) cannot be considered narrowly tailored because they only applied to religious worship services but not to other secular gatherings. *Agudath Israel*, 2020 WL 7691715, at *8. The court rejected the same contention the Governor makes here, which is that the nature of religious worship services requires disparate treatment. *Id.* (noting that the Governor's fixed capacity limitations cannot be narrowly tailored because they are based solely on "broad generalizations made by public-health officials about inherent features of religious worship"). Such generalizations are insufficient because "the Governor must explain why the Order's density restrictions targeted at houses of worship are more effective than generally applicable restrictions on duration of gatherings or requirements regarding masks and distancing." *Id.*

Here, much like in *Catholic Diocese*, *Calvary Chapel Dayton Valley*, and *Agudath Israel*, the Governor's regulations are not narrowly tailored. In Tier 1 and the Regional Stay-At-Home Order jurisdictions, the Governor's Orders impose a **total prohibition on indoor religious worship services for 99.9% of California, including nearly all of Appellants' churches**. (9th Cir. dkt. 3-1 at 7–16.) In Tiers 2–4, much like Nevada's regulations, the Governor's Orders impose strict numerical caps on churches **and only churches** while completely exempting certain businesses or applying less stringent percentage caps without a strict numerical limit like that imposed on churches. (*Id.* at 16-19.) The Blueprint and the Regional Stay-At-Home Order are not narrowly tailored or the least restrictive means.

In sum, while the L.A. County Order provides no relief, the fact that it recognized the need to lift the restrictions has destroyed the slender reed the Governor was clinging to that only a total prohibition on religious worship services is sufficient.

The L.A. County Order demonstrates—as have many other states—that the state can and must treat houses or worship equally to other nonreligious activities. Allowance to operate in compliance with social distancing and enhanced sanitization (as permitted by the L.A. County Order) is what Appellants' have been requesting since the inception of this litigation in July. (9th Cir. dkt. 3-5, V. Compl. at 69–72.)

III. APPELLANTS HAVE CHALLENGED THE SINGING AND CHANTING PROHIBITION SINCE THE INCEPTION OF THIS LITIGATION, AND IT SHOULD LIKEWISE BE ENJOINED.

Appellants have—since the inception of this litigation—challenged the total ban on singing and chanting. (9th Cir. dkt. 3-5, V. Compl. ¶ 1 ("Plaintiffs seek a TRO and preliminary injunction restraining enforcement against Plaintiffs of the various COVID-19 orders issued by Governor Newsom and other State officials . . . [**p]rohibiting singing or chanting during religious worship** in counties where indoor worship remains permissible . . . .").) Appellants also set forth numerous scriptural commands to sing as part of their worship. (9th Cir. dkt. 3-5, V. Compl. ¶¶ 59–64.)

In their First Motion for TRO and Preliminary Injunction, Appellants likewise challenged the prohibition on singing and chanting. (Dist. Ct. dkt. 4-1, Memorandum in Support of Motion for TRO and Preliminary Injunction, at 1, 2, 7 (noting, *inter alia*, that the prohibition on singing and chanting is unconstitutional because it "purport[s] to dictate the manner in which Plaintiffs may engage in acceptable religious worship".) In their Renewed Motion for TRO and Preliminary Injunction, Appellants likewise challenged the prohibition on singing and chanting. (Dist. Ct. dkt. 58-1 at 5; *see also* Reply in Support of Motion for TRO and Preliminary Injunction, Dist. Ct. dkt. 68, at 20–21 (noting that "Plaintiffs' churches all have sincerely held religious beliefs that they are to sing to the Lord in the congregation

of believers." (citing V. Compl. ¶¶ 59–64).) And in this Court, too, Appellants have raised constitutional challenges and sought relief prohibiting the Governor from enforcing his unconstitutional prohibition on singing and chanting. (9th Cir. dkt. 3-1, Emergency Motion for Injunction Pending Appeal, at 5; 9th Cir. dkt. 8, Reply in Support of Emergency Motion for Injunction Pending Appeal, at 4.)

The Governor may not prohibit the manner and orthodoxy of Appellants' religious worship services by banning singing or chanting.

> **If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**. If there are any circumstances which permit an exception, they do not now occur to us.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

"The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government **as well as those of faith and doctrine**.'" *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) (emphasis added) (quoting *Kedroff v. Saint Nicholas Cathedral of Russion Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Indeed, "among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (cleaned up) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). "**State interference in that**

sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion." *Id.* (emphasis added).

The Governor has no authority to dictate the proper manner of religious worship or prohibit the free exercise of singing to the Lord. Indeed,

> **In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.** The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

Watson v. Jones, 80 U.S. 679, 728 (1871) (emphasis added).

The Governor's astounding contention that he may ban a deeply-held religious practice of singing to the Lord (*see* 9th Cir. dkt. 3-5, V. Compl. ¶¶ 58–65), is foreign to the First Amendment. And, his argument that singing and chanting present increased health risk is disputed by actual studies relating to COVID.[1] And,

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[1] In fact, studies have shown that singing and chanting pose no greater risks than talking. *See, e.g.*, Jonathan Reid, et al., *Comparing the Respirable Aerosol Concentrations and Particle Size Distributions Generated by Singing, Speaking and Breathing* (Aug. 20, 2020), *available at* https://chemrxiv.org/articles/preprint/Comparing_the_Respirable_Aerosol_Concentrations_and_Particle_Size_Distributions_Generated_by_Singing_Speaking_and_Breathing/12789221; Christian J. Kähler & Rainer Hain, *Singing in choirs and making music with wind instruments – Is that safe during the SARS-CoV-2 pandemic?*, Inst. Fluid Mechanics and Aerodynamics, U. Bundeswehr Munich (June 2020), DOI: 10.13140/

as is true of the disparate treatment of religious worship services in general, the July 6 Guidance for Religious Worship Services imposes singing and chanting prohibitions **only on religious worship services**. (9th Cir. dkt. 3-5 at 182 ("Discontinue singing (in rehearsals, services, etc.), chanting, and other practices and performances . . . .").) It does not apply to singing Happy Birthday at birthday party gatherings or singing at any other nonreligious gatherings. "**[E]ven in a pandemic, the Constitution cannot be put away and forgotten**." *Catholic Diocese*, 141 S. Ct. at 68 (emphasis added). This Court should enjoin the Governor's orders banning a deeply-held, core religious practice, including any provisions requiring Appellants to wear face coverings if doing so hinders their ability to exercise their religious beliefs in worship.[2]

IV. THE REGIONAL STAY-AT-HOME ORDER SHOULD LIKEWISE BE ENJOINED BECAUSE IT SUPPLEMENTS THE BLUEPRINT AND IS PART OF THE SAME UNCONSTITUTIONAL REGIME, CHALLENGED IN APPELLANTS' COMPLAINT.

RG.2.2.36405.29926; *see also* Pat Ashworth, *Singing might not be so great a risk, after all*, Church Times (June 4, 2020), https://www.churchtimes.co.uk/articles/2020/5-june/news/uk/singing-might-not-be-so-great-a-risk-after-all; Lauren Moss, *Singing no riskier than talking for virus spread*, BBC News (Aug. 20, 2020), https://www.bbc.com/news/health-53853961.

[2] The Governor's mask mandate permits exceptions for other gatherings, but not for religious gatherings where facial coverings inhibit religious exercise. *See* Guidance for the Use of Face Coverings (Nov. 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx. Those discriminatory exceptions also violate the First Amendment. *See, e.g.*, *Denver Bible Church v. Azar*, No. 1:20-cv-02362, 2020 WL 6128994, at *11 (D. Colo. Oct. 15, 2020).

Because of the seemingly endless and ever-changing nature of the Governor's COVID-19 orders, Appellants have sought relief from not only those orders in place at the time they filed the Verified Complaint, but also from "any other future order to the extent any such order prohibits Plaintiffs' religious worship services and imposes prohibitions on singing, chanting, and other forms of worship." (9th Cir. dkt. 3-5, V. Compl. at 69; *see also* 9th Cir. dkt. 3-5, V. Compl. at 71 (requesting TRO and preliminary injunction against current orders and any "further limitations or restrictions that the State may impose in any future modification, revision, or amendment of the Governor's Order or similar legal directive").) Thus, Appellants have challenged and are challenging the Regional Stay-At-Home Order as an extension of the challenged regime of the Governor's COVID-19 restrictions. Because it, too, is unconstitutional, this Court should enjoin enforcement of it as well.

CONCLUSION

The Governor's Orders still completely prohibit all indoor religious worship services in the counties subject to the Stay-At-Home Order and in Blueprint Tier 1, and impose discriminatory restrictions on religious worship services in Blueprint Tiers 2–4. Thus, the Court should enjoin (1) the discriminatory prohibitions on religious gatherings, (2) the discriminatory singing and chanting prohibitions, and (3) the discriminatory facial covering restrictions.

Respectfully submitted,

Dated: December 31, 2020

/s/ Daniel J. Schmid

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2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Daniel J. Schmid
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Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record..

/s/ Daniel J. Schmid
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Attorney for Plaintiffs–Appellants