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

CIRCUIT RULE 3-3 PRELIMINARY INJUNCTION APPEAL

PLAINTIFFS–APPELLANTS' OPENING 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: January 19, 2020

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TABLE OF CONTENTS

DISCLOSURE STATEMENT……………………………………………………...i

TABLE OF CONTENTS……………………………………………………...ii

TABLE OF AUTHORITIES……………………………………………………vi

JURISDICTION…………………………………………………………………1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW…………………..2

STATEMENT OF THE CASE…………………………………………………..4

I. FACTS……………………………………………………………………4

A. Harvest Churches And Their Religious Ministries……………………4

B. The Governor's COVID-19 Restrictions And Prohibitions On Religious Worship Services………………………………………..6

1. The Initial COVID-19 Discriminatory Restrictions And Prohibitions On Religious Worship Services…………………..6

2. The Blueprint's Discriminatory Restrictions And Prohibitions On Religious Worship Services…………………13

a. Restrictions on religious worship services……………..13

b. Restrictions and exemptions for other sectors under the Blueprint……………………………………...14

3. The Regional Stay At Home Order's Discriminatory Restrictions And Prohibitions On Religious Worship Services……………………………………………………18

C. Harvest Churches Compliance With Social Distancing And Enhanced Sanitation Protocols……………………………………21

D. The Government's Threatened Enforcement Of The Governor's Orders And Threats Of Criminal Prosecution, Fines, Jail, And Closure Of Their Churches..........23

II. PROCEDURAL HISTORY..........24

A. Previous Denial Of Preliminary Injunction, Appeal, And Supreme Court's GVR Order..........24

B. Proceedings In The District Court, The IPA Proceedings In This Court, And The Instant Appeal..........26

SUMMARY OF THE ARGUMENT..........28

STANDARD OF REVIEW..........29

LEGAL ARGUMENT..........30

I. THE SUPREME COURT AND PRIOR PANELS OF THIS COURT DEMAND A FINDING THAT HARVEST CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE EXERCISE CLAIMS..........30

A. The Discriminatory and Especially Harsh Treatment Imposed On Harvest Churches Under The Blueprint And The Regional Stay At Home Order Violate The First Amendment Under *Catholic Diocese*, This Court's Decisions In *Calvary Chapel Dayton Valley* And *Calvary Chapel Lone Mountain*, And The Decisions Of Every Other Circuit To Address The Issue Post-*Catholic Diocese*..........30

B. The Prior Panel Rule Requires A Finding That Discriminatory and Especially Harsh Treatment Imposed On Harvest Churches Under The Blueprint And The Regional Stay At Home Order Violate The First Amendment..........36

C. The Regional Stay At Home Order And The Blueprint Also Continue To Impose Internal Discrimination On The Services And Activities Harvest Churches Are Able To Provide In Their Buildings..........38

D. Under *Catholic Diocese* And This Court's Binding Decision In *Calvary Chapel Dayton Valley*, The Governor's Blueprint And Regional Stay At Home Order Are Subject To And Cannot Survive Strict Scrutiny……………………………………………40

1. The Governor's Orders Substantially Burden Harvest Churches Sincerely Held Religious Beliefs……………………40

2. Because The Orders Impose Total Prohibitions And Discriminatory Restrictions On Harvest Churches Religious Worship Services While Leaving Scores Of Nonreligious Gatherings Open Without Restrictions, They Are Not Narrowly Tailored Or The Least Restrictive Means……………………………………………………41

E. The Governor's So-Called Experts, And Their Speculative Testimony, Do Not And Cannot Overcome The Binding Decision Of *Catholic Diocese*, Which Rejected The Same Contentions Presented By The Governor In This Matter……………45

F. The Governor's Prohibition On Harvest Churches' Religious Exercise Of Singing And Chanting Violates The First Amendment…………………………………………………48

II. HARVEST CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ESTABLISHMENT CLAUSE CLAIM……………..50

III. *CATHOLIC DIOCESE* AND *CALVARY CHAPEL DAYTON VALLEY* DEMAND A FINDING THAT HARVEST CHURCHES HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF…….53

A. Appellants Suffer Irreparable Harm Each Day The Orders Remain In Place……………………………………………..54

B. Harvest Churches Suffer Under The Yoke Of Threatened Closure Of Their Churches Every Day The Orders Remain In Place……………………………………………………54

C. Applicants Comply With Safety Protocols…………………………56

IV. HARVEST CHURCHES SATISFY THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF……………………….……………………57

A. *Catholic Diocese* Compels A Finding That The Balance Of The Harms Favors Injunctive Relief…………..……………………..57

B. *Catholic Diocese* Compels A Finding That The Public Interest Favors Injunctive Relief……………………………………..58

CONCLUSION…………………………………………………….……...60

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS….…61

CERTIFICATE OF SERVICE………………………...………………………62

TABLE OF AUTHORITIES

CASES

Agudath Israel of Am. v. Cuomo, No. 20-3572,
2020 WL 7691715 (9th Cir. Dec. 28, 2020)………………………………..……*passim*

Ashcroft v. ACLU, 542 U.S. 656 (2004)……………………………………...42

Bruni v. City of Pittsburgh, 824 F.3d 353 (3d Cir. 2016)….………………………43

Burson v. Freeman, 504 U.S. 191 (1992)………………………………...41, 42

Calvary Chapel Dayton Valley v. Sisolak,
982 F.3d 1228 (9th Cir. 2020)…………………………………………...*passim*

Calvary Chapel Lone Mountain v. Sisolak,
831 F. App’x 317 (9th Cir. 2020)…………………………….…………*passim*

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)………………………………………………………...2

City of Boerne v. Flores, 521 US. 507 (1997)…………………..……………..41

Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019)…..………….…………..29

Env’t Def. Fund, Inc. v. Andrus, 625 F.2d 861 (9th Cir. 1980)…….……………….1

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947)………………………52

Feldman v. Az. Sec’y of State’s Office, 843 F.3d 366 (9th Cir. 2016)………………2

Gillette v. United States, 401 U.S. 437 (1971)……………………………………51

Givens v. Newsom, 830 F. App’x 560 (9th Cir. 2020)……….…………………...1

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006)…………………………………………………………42

Harvest Rock Church v. Newsom, No. 20A94,
2020 WL 7061630 (U.S. Dec. 3, 2020)……………………………………………26

Harvest Rock Church, Inc. v. Newsom,
977 F.3d 728 (9th Cir. 2020)……………………………………………………*passim*

Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017)……………………………..29

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012)…………………………………………………………………49

Kedroff v. Saint Nicholas Cathedral of Russion Orthodox Church in N. Am.,
344 U.S. 94 (1952)………………………………………………………………...49

Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947 (9th Cir. 2012)……..……………..36

Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011)………………………57

Lund v. Rowan Cnty., 863 F.3d 268 (4th Cir. 2017)………………………………52

Lynch v. Donnelly, 465 U.S. 668 (1984)…………………………………………..51

Maryville Baptist Church, Inc. v. Beshear,
957 F.3d 610 (6th Cir. 2020)……………...………………………………………41

McCullen v. Coakley, 134 S. Ct. 2518 (2014)…………………..……………..42, 43

Monclova Christian Acad. v. Tuledo-Lucas Cnty. Health Dep't,
No. 20-4300, 2020 WL 7778170 (6th Cir. Dec. 31, 2020)……………………33, 36

On Fire Christian Ctr., Inc. v. Fischer,
453 F. Supp. 3d 901 (W.D. Ky. Apr. 11, 2020)…………………...……40, 57, 58

Our Lady of Guadalupe Sch. v. Morrisey-Berru,
140 S. Ct. 2049 (2020)………………..……………………………………..39, 48

Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott,
869 F.2d 1306 (9th Cir. 1989)……………………………………………………1

Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020)……………………………………29

Rodriguez-Martinez v. Holder, 498 F. App'x 713 (9th Cir. 2012)……………………37

Roman Catholic Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63 (2020)……………………………………………………………*passim*

Ross Island Sand & Gravel v. Matson,
226 F.3d 1015 (9th Cir. 2009)………………………………………………………..36

Sanders Cnty. Republican Cent. Comm. v. Bullock,
698 F.3d 741 (9th Cir. 2012)………………………………………………29, 30

Sw. Voter Registration Educ. Project v. Shelley,
344 F.3d 914 (9th Cir. 2003)……………………………………………………29

Thomas v. Rev. Bd. of Ind. Emp. Security Div.,
450 U.S. 707 (1981)………………………………………………………..40, 42

United States v. Easterday, 564 F.3d 1004 (9th Cir. 2009)……………………36

Watson v. Jones, 80 U.S. 679 (1871)……………………………………………49

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)……………………51

STATUTES

28 U.S.C. §1291(a)(1)……………………………………………………………1

California Government Code § 8665…………………………………………………8

Fed. R. App. P. 26.1………………………………………………………………i

OTHER

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…………………………………………..…………………59

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/ RG.2.2.36405.29926…………………………………………………...50

Hebrews 2:12 ……………………………………………………………………5

Hebrews 10:25…………………………………………………………………5, 40

Industry guidance to reduce risk, https://covid19.ca.gov/industry-guidance/ (last updated Jan. 14, 2021, 1:08 PM)

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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.....................50

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Psalm 59:16……………………………………………………………………...5

JURISDICTION

This Court has jurisdiction over the instant appeal under 28 U.S.C. §1291(a)(1) because it is from the district court's Order entered December 21, 2020 (I-ER-001-014, "Order") denying Plaintiffs-Appellants Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. Plaintiffs-Appellants timely filed their Notice of Appeal (II-ER-033) the same day, December 21, 2020. While the district court's styled its denial as to only the temporary restraining order (TRO), that is not dispositive of this Court's jurisdiction here because it was a decision based on the likelihood of success on the merits and issued after full briefing, evidentiary submissions, and an adversary hearing.

While a TRO denial is typically not immediately appealable, "a denial of a TRO may be appealed if, as here, the circumstances render the denial 'tantamount to the denial of a preliminary injunction.'" *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (quoting *Env't Def. Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). A TRO denial is tantamount to a denial of a preliminary injunction where, as here, the denial followed a "full adversary hearing" and "in the absence of review, the appellant would be effectively foreclosed from pursuing further relief." *Givens v. Newsom*, 830 F. App'x 560, 560-61 (9th Cir. 2020) (quoting *Religious Tech Ctr.*, 869 F.2d at 1308-09). Here, the district court's denial followed a full briefing schedule, voluminous

evidentiary submissions and consideration, and an adversary hearing on December 18 (I-ER-003), and the district court's denial was based on the seminal likelihood of success prong, effectively foreclosing Plaintiffs from seeking further relief. Moreover, Plaintiffs filed an emergency motion for an injunction pending appeal with the district court, which mirrors the analysis for a preliminary injunction, *Feldman v. Az. Sec'y of State's Office*, 843 F.3d 366, 374 (9th Cir. 2016), and the district court denied that based on the same likelihood of success analysis. (*See* 9th Cir. dkt. 3-2.)

This Court therefore has jurisdiction over the TRO denial because it is tantamount to a denial of a preliminary injunction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented are of grave importance to "the Nation's essential commitment to religious freedom," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), especially in the current times of pandemic and uncertainty. As the Supreme Court unequivocally held in an appeal of similar COVID-19 restrictions on religious gatherings, "even in a pandemic, **the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (emphasis added) (*Catholic Diocese*). Indeed, "[t]he restrictions at issue here, by effectively barring many from attending religious worship services, strike at the very heart of the First Amendment's

guarantee of religious freedom." *Id.* And, as Justice Gorsuch succinctly stated, "**[i]t 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 72 (emphasis added).

The issues presented for review are:

(1) Whether the district court erred in holding, despite the unequivocal holding of *Catholic Diocese*, 141 S. Ct. 63 (2020) that discriminatory restrictions on religious worship services cannot survive First Amendment scrutiny, Appellants are not likely to succeed on the merits of their Free Exercise claim against the Governor's total prohibitions and discriminatory restrictions on religious worship services in the Regional Stay at Home Order and the Blueprint because they are not discriminatory, do not require strict scrutiny, but would nevertheless survive strict scrutiny if applied?

(2) Whether the district court erred in holding that Appellants are not likely to succeed on the merits of their Free Exercise claim against the Governor because, despite exempting many of the same industries highlighted by *Catholic Diocese*, such activities were distinct and did not demonstrate discriminatory treatment of Appellants' Churches?

(3) Whether the district court erred in holding that, despite exempting many of the exact same industries highlighted by *Catholic Diocese* as demonstrative of a lack of narrow tailoring, the Regional Stay at Home Order and the Blueprint are narrowly tailored?

(4) Whether the district court erred in relying on the rank speculation of so-called experts claiming that religious worship services are more dangerous than other activities and can thus be singled out for harsh treatment when *Catholic Diocese* was presented with the same argument and squarely rejected it?

(5) Whether the district court erred in holding that Appellants are not likely to succeed on the merits of their Establishment Clause claim when the Regional Stay at Home Order and the Blueprint impose overt hostility on religious gatherings and prohibit individuals from attending religious worship services.

<u>STATEMENT OF THE CASE</u>

I. FACTS

A. Harvest Churches And Their Religious Ministries.

Harvest Churches comprise Harvest Rock Church, Inc., a Christian church with multiple campuses in California, including in in Pasadena, Irvine, and Corona, and Harvest International Ministries, Inc., a Christian ministry organization based in Pasadena, with numerous member churches throughout 18 counties in California. (III-ER-214-217, V. Compl., ¶¶40, 41, 48, 54; II-ER-039, ¶4.) Each of the Harvest

Churches has and exercises the sincere religious belief that its fundamental purpose is to worship God as an assembled body of believers, where the Church ministers the Gospel of Jesus Christ to its congregants, and its congregants receive Biblical instruction and minister to the needs of one another and the community. (III-ER-215-218, V. Compl., ¶¶48, 49, 51, 54, 55, 57.)

Each of the Harvest Churches has and exercises the sincere religious belief that it must structure its worship and community support according to the commands and standards in the Bible. (III-ER-215, 218, V. Compl., ¶¶50, 58.) Regarding worship, Churches believe they must assemble for worship, in-person, as a critical requirement of both obedience to the Bible and fulfillment of the Church's fundamental purpose, and to do so even more in times of peril and crisis. (III-ER-215-219, V. Compl., ¶¶48–50, 54, 57, 58, 65.[1]) And Harvest Churches worship includes, according to sincerely held beliefs, singing together their praise to God and reliance on Him. (III-ER-218-219, V. Compl., ¶¶59–64.)[2] Harvest Churches also, in accordance with their sincerely held beliefs, meet in small groups hosted in

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

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

members' homes to worship, study the Bible, fellowship, and minister to each other's needs. (III-ER-217-218, V. Compl., ¶¶52, 53, 56.) Harvest Churches believe they cannot effectively obey the Bible and fulfill their religious purposes worshipping on the Internet. (III-ER-215, 217, V. Compl., ¶¶48, 54.)

Regarding service to their communities, each of the Harvest Churches has and exercises the sincere religious belief that the Bible commands Churches to provide food, clothing, shelter, and counsel to the needy and afflicted. (III-ER-216-217, V. Compl., ¶¶51, 55.) In accordance with these sincere beliefs, Harvest Rock Church operates a ministry at its Church called the Hope Center, staffed by Church leaders and volunteers, which provides support for those with financial, familial, emotional, and spiritual needs. (III-ER-216, V. Compl., ¶51.) Many of Harvest International Ministries' member Churches throughout California have programs at their Churches providing food for the hungry, financial and ministry support for those in need, and Biblical and social-service-type counseling for members of their communities. (III-ER-217, V. Compl., ¶55.)

B. The Governor's COVID-19 Restrictions And Prohibitions On Religious Worship Services.

1. The Initial COVID-19 Discriminatory Restrictions And Prohibitions On Religious Worship Services.

For eleven months, Governor Newsom and his designee, the California State Public Health Officer, have issued and amended a series of orders and guidances in

response to COVID-19, extensively restricting when, where, and how Californians may exercise their liberties, including gathering for religious worship according to conscience, while exempting myriad businesses and nonreligious activities from gathering restrictions. (III-ER-220-230, V. Compl., ¶¶ 66–103; II-ER-050-056.)

The Governor's COVID-19 scheme of restrictions and exemptions began with his **Emergency Proclamation**, issued March 4, 2020, proclaiming a "State of Emergency" in California due to COVID-19, which has no expiration by its own terms. (III-ER-273-277, V. Compl. Ex. A.) Proceeding from the Emergency Proclamation, the Governor's Orders most relevant to this appeal are as follows:

- The March 12 **Executive Order N-25-20** states that all residents of California "are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures." (III-ER-278-282, V. Compl. Ex. B.)

- The **March 19 Stay-at-Home Order**, issued by the State Public Health Officer at the Governor's direction, **orders** "all individuals living in the State of California to **stay home** or at their residence," but **exempted** travel for 16 expansive "federal critical infrastructure sectors" with **130 subsectors**, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "food, shelter, and social services, and other necessities of

life for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers (such as Wells Fargo and Chase centers), and (g) "radio, television, and media service" organizations (of any size), and numerous other exempted businesses and operations (of any size); but **does not exempt** travel to attend religious worship. (III-ER-283, V. Compl. Ex. C (emphasis added); III-ER-284-294, V. Compl. Ex. D; III-ER-295-296, V. Compl. Ex. E.) The March 19 Stay-at-Home Order did not impose any numerical or other limitations on people participating in the exempted activities, apart from advising that "they should at all times practice social distancing." (III-ER-283, V. Compl. Ex. C.)

- The March 19 **Executive Order N-33-20** incorporates and puts the full power of the Governor's office behind the Stay-at-Home Order, directs the Governor's Office of Emergency Services "to take necessary steps to ensure compliance" with the order, and gives notice to the public that the order is enforceable pursuant to California Government Code § 8665, which provides that violating the Governor's orders is a misdemeanor criminal offense punishable by up to a $1,000 fine, six months in jail, or both. (III-ER-295-296, V. Compl. Ex. E.)

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

support and faith-based services," but **imposed** a unique qualifier on religious worship not applicable to other "Essential" services, limiting exempt "faith-based services" to those "that are **provided through streaming or other technologies** that support physical distancing and state public health guidelines." (III-ER-310-332, V. Compl. Ex. G.)

- The **May 25 Worship Guidance**, pursuant to further executive and public health orders providing for the modification of stay-at-home restrictions, **authorized the limited reopening** of places of worship for in-person religious worship at "25% of building capacity or a maximum of 100 attendees, whichever is lower," after "a county public health department's approval of religious services," but **imposed** a combination of significant mandatory and suggested restrictions on places of worship, including temperature screenings upon entering a church, eye-protection and gloves for workers, face coverings for employees, volunteers, and attendees, posting signage throughout the facility to inform attendees of the face covering and glove requirements, discouraging use of shared items such as Scriptures and Hymnals, discontinuing use of offering plates, discouraging handshakes or hugging of any kind, discontinuing singing, group recitation, and similar practices, and others. (III-ER-333-335, V. Compl. Ex. H; III-ER-341-353, V. Compl. Ex. J.)

- The revised **July 1 Worship Guidance** expressly **prohibits singing and chanting** in worship, and reimposes the indoor worship limitation of 25% of building capacity or maximum of 100 people, whichever is lower. (III-ER-354-367, V. Compl. Ex. K.)

- The revised **July 6 Worship Guidance** changed the singing and chanting prohibition to apply only indoors. (III-ER-368-381, V. Compl. Ex. L.)

- On **July 13** the Governor **announced** the reinstatement of previously relaxed stay-at-home restrictions for the 30 counties on the California Department of Public Health County Monitoring List, which restrictions **banned in-person worship services** in those counties. (III-ER-227, V. Compl., ¶¶94, 95.)

- The ensuing **July 13 Health Order** closed indoor operations throughout the state for certain non- "Essential Critical" businesses, and additionally specified the **closure of places of worship** and certain other businesses in counties on the County Monitoring List. (III-ER-382-386, V. Compl. Ex. M.)

- The **July 29 Worship Guidance** continued the ban on indoor worship singing, and the numerical restriction for indoor worship of 25% of building capacity or 100 people, whichever is fewer. (II-ER-067-080, Joint Statement Ex. C.) The July 29 Worship Guidance also repeats an acknowledgement, present in all preceding Worship Guidances:

> Precise **information about the number and rates of COVID-19 by industry or occupational groups, including among critical**

> **infrastructure workers, is not available at this time.** There have been **multiple outbreaks in a range of workplaces, indicating that workers are at risk** of acquiring or transmitting COVID-19 infection. Examples of **these workplaces include places of worship**, hospitals, long-term care facilities, prisons, **food production, warehouses, meat processing plants, and grocery stores**.

(II-ER-068, Joint Statement Ex. C (emphasis added); III-ER-227, V. Compl., ¶93; *cf.* May 25 Worship Guidance, III-ER-341-353, V. Compl. Ex. J (same); July 1 Worship Guidance, III-ER-354-367, V. Compl. Ex. K (same); July 6 Worship Guidance, III-ER-368-381, V. Compl. Ex. L (same).)

- The **August 28 Health Order** authorized one aspect of the current scheme of COVID-19 restrictions in California, implemented on August 28 under the umbrella designation "Blueprint for a Safer Economy" (the "**Blueprint**"), which is a framework of risk tiers and sector-specific restrictions within each tier, applied and periodically adjusted, county-by-county, throughout the State. (II-ER-049-50, 052; II-ER-124-126, JS Ex. H.) Counties may move in both directions within the Blueprint tier framework—from a more restrictive tier to a less restrictive tier, and back to a more restrictive tier again. (II-ER-049.) The Blueprint is administered through its online **Industry Guidance**[3] incorporating numerous sector-specific guidances. (II-ER-053.) The August 28 Health Order leaves in place all other statewide health orders and guidances to the extent not expressly altered by the order,

[3] *Cf. Industry guidance to reduce risk*, https://covid19.ca.gov/industry-guidance/ (last updated Jan. 19, 2021, 10:06 AM).

including the March 19 Stay-at-Home Order. (II-ER-052; II-ER-124-126, JS Ex. H; III-ER-310-332, V. Compl. Ex. G.)

2. The Blueprint's Discriminatory Restrictions And Prohibitions On Religious Worship Services.

a. Restrictions on religious worship services.

As applied to the "Places of Worship" sector, which includes Harvest Churches, the Blueprint identifies specific restrictions for each tier:

- **Tier 1-Widespread:** No in-person, indoor worship allowed; only outdoor worship permitted.
- **Tier 2-Substantial:** Allowed to open indoors at maximum of 25% capacity or 100 people, whichever is fewer; outdoor worship permitted.
- **Tier 3-Moderate:** Allowed to open indoors at maximum of 50% capacity or 200 people, whichever is fewer; outdoor worship permitted.
- **Tier 4-Minimal:** Allowed to open indoors at maximum of 50% capacity; outdoor worship permitted. (II-ER-049-050.)

The Blueprint tiers and sector-specific restrictions for Places of Worship under the August 28 Health Order supersede the July 13 Health Order (II-ER-126, JS Ex. H at 3), which prohibited indoor worship in counties on the County Monitoring List (32 when the Verified Complaint was filed) (III-ER-227-228, V. Compl., ¶¶94–97). Counties not on the Monitoring List were subject only to the July 29 Worship Guidance. (II-ER-052.) In Tiers 2–4, where indoor worship is

allowed, indoor singing and chanting are still prohibited under the July 29 Worship Guidance. (II-ER-050; II-ER-078, JS Ex. C at 13.)

b. Restrictions and exemptions for other sectors under the Blueprint.

For sectors other than Places of Worship, the Blueprint modified some restrictions and exemptions as compared to prior Orders, but left others in place. (II-ER-053.) For example:

- **Grocery stores** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (III-ER-223-224, V. Compl., ¶¶77–78; III-ER-310-332, V. Compl. Ex. G), and became classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the **July 29 Retail Guidance** (II-ER-053-054; II-ER-127, JS Ex. I.) Grocery stores could operate without capacity or numerical limit under the April 28 Essential Workforce Guidance (II-ER-053-054), but the Blueprint permits grocery stores to operate at 50% capacity under Tier 1–Widespread and Tier 2–Substantial, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (II-ER-053-054.)

- **Essential retail** stores, such as Walmart and Costco, which are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (III-ER-223-224, V. Compl., ¶¶77–78; III-ER-310-332, V. Compl. Ex. G), are also now classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the July 29 Retail Guidance. (II-ER-054; II-

ER-127, JS Ex. I.) Essential retail stores could operate without capacity or numerical limit under the April 28 Essential Workforce Guidance (II-ER-053-054), but the Blueprint permits essential retail stores to operate at 25% capacity under Tier 1, 50% capacity under Tier 2, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (II-ER-054.)

- **Laundromats** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (III-ER-223-224, V. Compl., ¶¶77–78; III-ER-310-332, V. Compl. Ex. G), and are now classified in the "Limited Services" sector of the Blueprint, subject to the Industry Guidance and **July 29 Limited Services Guidance** (II-ER-053-054.) Both the April 28 Essential Workforce Guidance and the Blueprint allow laundromats to operate without numerical limits. (II-ER-053-054.)

- **Warehouses** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (III-ER-223-224, V. Compl., ¶¶77–78; III-ER-310-332, V. Compl. Ex. G), and are classified in the "Logistics and warehousing facilities" sector of the Blueprint, subject to the Industry Guidance and **July 29 Logistics and Warehousing Guidance** (II-ER-055; II-ER-0156-164, JS Ex. K.) Both the April 28 Essential Workforce Guidance and the Blueprint allow warehouses to operate without numerical limits. (II-ER-055.)

- **Food packing and processing** are designated "Essential Critical Infrastructure" operations under the April 28 Essential Workforce Guidance (III-ER-223-224, V. Compl., ¶¶77–78; III-ER-310-332, V. Compl. Ex. G), and are classified in the "Critical Infrastructure" sector of the Blueprint (II-ER-060, JS Ex. A at 1). Both the April 28 Essential Workforce Guidance and the Blueprint allow food packing and processing operations without numerical limits.

- The provision of "**food, shelter, and social services, and other necessities of life** for economically disadvantaged or otherwise needy individuals" is designated as "Essential Critical Infrastructure" under the April 28 Essential Workforce Guidance (III-ER-223-224, V. Compl., ¶¶77–78; III-ER-310-332, V. Compl. Ex. G), and is now classified in the "Critical Infrastructure" sector of the Blueprint (II-ER-060, JS Ex. A at 1). Both the April 28 Essential Workforce Guidance and the Blueprint allow such provision without numerical limits. Furthermore, every version to date of the Worship Guidances exempts such activities, as well as schooling, from worship restrictions in the same church. (III-ER-341-354, V. Compl. Ex. J (excluding from worship restrictions "food preparation and service, delivery of items to those in need, . . . school and educational activities, . . . counseling, . . .and other activities that places and organizations of worship may provide"); III-ER-354-367, V. Compl. Ex. K (same); III-ER-368-381, V. Compl. Ex. L (same); II-ER-069, JS Ex. C at 3 (same).)

- Many **other sectors'** restrictions under the Blueprint are **less stringent** than those applicable to places of worship. For example:

  - Churches in Tier 2 may open for indoor worship at 25% capacity or 100 people, whichever is fewer. (II-ER-049.) By comparison, laundromats, warehouses, and meat packing plants in Tier 2 (or any tier) may operate with **no percentage or numerical caps** (II-ER-054-055; III-ER-310-332, V. Compl. Ex. G); grocery and "essential" retail stores (e.g., Walmart, Costco, and 'big box' stores) in Tier 2 may operate at 50% capacity, but with **no numerical cap** (II-ER-054-055); museums in Tier 2 may operate at 25% capacity, but with **no numerical cap** (II-ER-061, JS Ex. A at 2); gyms and fitness centers in Tier 2 may operate at 10% capacity, but with **no numerical cap** (II-ER-062, JS Ex. A at 3.)

  - Churches in Tier 3 may open for indoor worship at 50% capacity or 200 people, whichever is fewer. (II-ER-050.) By comparison, laundromats, warehouses, meat packing plants, and grocery and "essential" retail stores in Tier 3 may operate with **no percentage or numerical caps** (II-ER-054-055; III-ER-310-332, V. Compl. Ex. G); museums in Tier 3 may operate at 50% capacity, but with **no numerical cap** (II-ER-061, JS Ex. A at 2); gyms and fitness centers in Tier 3 may operate at 25% capacity, but with **no numerical**

cap (II-ER-062, JS Ex. A at 3); and cardrooms in Tier 3 may operate at 25% capacity, but with **no numerical cap** (II-ER-064, JS Ex. A at 5.)

3. The Regional Stay At Home Order's Discriminatory Restrictions And Prohibitions On Religious Worship Services.

As was true under the Blueprint and every iteration of COVID-19 restriction since July 13, and as the district court recognized, the Regional Stay at Home Order **completely prohibits** Harvest Churches from gathering for indoor religious worship services. (I-ER-004-005; *see also* 9th Cir. dkt. 28-1, Second Supplemental Br. at 6-12.) But, as was also true under the Blueprint, the list of exempt activities under the Regional Stay at Home Order contains **29 pages exempting 13 sectors and hundreds of subsectors of gatherings that are not subject to the total prohibition imposed on religious worship services**. (*See* 9th Cir. dkt. 28-2, Essential Critical Infrastructure Workers Sector Index at 1–2; *see also* 9th Cir. dkt. 28-1, Second Supplemental Br. at 6-12.) While Harvest Churches' religious worship services are banned if they include 1 person, the following sectors are not subject to any numerical restrictions whatsoever:

> (1) **Health Care/Public Health:** healthcare providers and caregivers, physicians, dentists, psychologists, mid-level practitioners, nurses, assistants and aid, infection control . . . pharmacists, physical, respiratory, speech, and occupational therapists and assistants, social workers, . . . chiropractors **and 21 other categories of exempt health workers** (9th Cir. dkt. 28-2 at 2-4);
>
> (2) **Emergency Services:** city police departments and fire stations, county sheriffs' offices, Department of Defense police and fire sector resources,

private security organizations and 8 other categories of businesses (9th Cir. dkt. 28-2at 5-6);

(3) **Food and Agriculture: groceries, pharmacies, convenience stores, and other retail that sells food and beverage products** (i.e., liquor stores) and animal/pet food, retail customer support service, information technology support staff, . . . **restaurants, food packaging and processing**, . . . livestock, poultry, seafood slaughter facilities . . . beverage production facilities, . . . sawmills and **18 other categories of other exempt Food and Agriculture workers** (9th Cir. dkt. 28-2at 7-9);

(4) **Energy:** workers supporting the energy sector . . . support workers, customer service operations, call centers, and emergency response and customer emergency operations . . . emergency environmental remediation and monitoring . . . gas stations and truck stops and numerous other categories (9th Cir. dkt. 28-2 at 9-10);

(5) **Water and Wastewater:** Operational staff at water authorities, Operational staff at community water systems, Operational staff at wastewater treatment facilities, Workers repairing water and wastewater conveyances and performing required sampling and monitoring, operation staff for water distribution and testing, Operational staff at wastewater collection facilities, Operational staff and technical support for SCADA control systems, Chemical disinfectant suppliers for water and wastewater and personnel protection, and Workers that maintain digital systems infrastructure supporting water and wastewater operations (9th Cir. dkt. 28-2 at 11);

(6) **Transportation and Logistics: airports, heliports, and landing strips . . . Mass Transit and Passenger Rail** include[ing] terminals, operational systems, and supporting infrastructure for passenger services by transit buses, trolleybuses, monorail, heavy rail—also known as subways or metros—light rail, passenger rail, and vanpool/rideshare, and **20 other categories of exempt Transportation and Logistics workers** (9th Cir. dkt. 28-2 at 11-15);

(7) **Communications and Information Technology: workers who support radio, television, and media services**, including but not limited to front line news reporters, studio, and technicians for newsgathering, reporting, and publishing news and **20 other categories of exempt Communications and Information Technology workers** (9th Cir. dkt. 28-2 at 15-18);

(8) **Government Operations and other community-based essential functions:** County workers responsible for determining eligibility for safety net benefits, Workers who support administration and delivery of unemployment insurance programs, income maintenance, employment service, disaster assistance, workers' compensation insurance and benefits programs . . . **real estate services and transactions**, and **18 other categories of exempt workers** (9th Cir. dkt. 28-2 at 18-20);

(9) **Critical Manufacturing:** Workers necessary for manufacturing of metals, industrial minerals, semiconductors, materials and products needed for supply chains of the critical infrastructure sectors, workers engaged in the manufacture and maintenance of equipment and other infrastructure for mining production and distribution, and **5 other categories of exempt Critical Manufacturing workers** (9th Cir. dkt. 28-2 at 20-21);

(10) **Financial Services:** Workers who are needed to process and maintain systems for processing financial transactions and services, including payment, clearing, and settlement; wholesale funding; insurance services; and capital markets activities, Workers who are needed to maintain orderly market operations to ensure the continuity of financial transactions and services, **Workers who are needed to provide business, commercial, and consumer access to banking and non-bank financial and lending services**, including ATMs, lending money transmission, and to move currency, checks, securities, and payments, and **4 other categories of exempt Financial Services workers** (9th Cir. dkt. 28-2 at 21-22);

(11) **Chemical and Hazardous Materials:** Workers supporting the chemical and industrial gas supply chains, including **workers at chemical manufacturing plants,** workers in laboratories, workers at distribution facilities, workers who transport basic raw chemical materials to the producers of industrial and consumer goods, including hand sanitizers, food and food additives, pharmaceuticals, textiles, building materials, plumbing, electrical and paper products and **9 other categories of exempt Chemical and Hazardous Materials workers** (9th Cir. dkt. 28-2 at 22-23);

(12) **Defense Industrial Base:** Workers who support the essential services required to meet national security commitments . . . including but are not limited to, space and aerospace workers, nuclear matters workers, mechanical and software engineers (various disciplines), manufacturing and production workers, IT support, security staff, security personnel, intelligence support,

aircraft and weapons systems mechanics and maintainers, and sanitary workers . . . Personnel working for companies, and their subcontractors, who perform under a contract or subcontract to the Department of Defense and **numerous other exempts Defense Industrial Base workers** (9th Cir. dkt. 28-2 at 24-25);

(13) **Industrial, Commercial, Residential, and Sheltering Facilities and Services:** Construction workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing, commercial, and mixed-use construction); and workers who support the supply chain of building materials from production through application/installation, including cabinetry, fixtures, doors, cement, hardware, plumbing, electrical, heating/cooling, refrigeration, appliances, paint/coatings, and employees who provide services that enable repair materials and equipment for essential functions, Workers such as plumbers, electricians, exterminators, and other service providers . . . Workers who support the supply chain of building materials . . . **Workers in hardware and building materials stores (i.e., "big-box" stores)**, consumer electronics, technology and appliances retail . . . Residential and commercial real estate workers . . . **Professional services such as legal or accounting services** . . . Workers supporting the entertainment industries, studios, or other related establishments (provided only that they follow social distancing), Workers who support food, shelter, and social services and other necessities of life, **Workers in laundromats**, laundry services, and dry cleaners **and 24 categories of exempt Industrial, Commercial, Residential, and Sheltering Facilities workers** (9th Cir. dkt. 28-2 at 25-28).

C. Harvest Churches Compliance With Social Distancing And Enhanced Sanitation Protocols.

Harvest Churches have complied, and are able and willing to continue complying, with social distancing and enhanced sanitization protocols to conduct safe worship services in their Churches. (III-ER-241-243, V. Compl., ¶¶119–125.) For example, Harvest Rock Church's Pasadena campus seats 1,250 people, and it has been permitting only the number of people that allows for effective social

distancing. (III-ER-242, V. Compl., ¶120.) The Church requires everyone to wear a mask into the building, takes the temperature of everyone entering, and spaces its attendees to achieve proper social distancing. (*Id.*) The Church also has its building and restrooms professionally sanitized after each worship service. (*Id.*)

Harvest Rock Church's Orange County campus seats 350 people, and it has been permitting only the number of people that allows for effective social distancing. (III-ER-242, V. Compl., ¶121.) The Church requires everyone to wear a mask into the building, takes the temperature of everyone entering, and spaces its attendees to achieve proper social distancing. (*Id.*) The Church also has its building and restrooms professionally sanitized after each worship service. (*Id.*)

Harvest Rock Church's Los Angeles campus seats 200 people, and it has been permitting only the number of people that allows for effective social distancing. (III-ER-242, V. Compl., ¶122.) The Church requires everyone to wear a mask into the building, takes the temperature of everyone entering, and spaces its attendees to achieve proper social distancing. (*Id.*) The Church also has its building and restrooms professionally sanitized after each worship service. (*Id.*)

Harvest Rock Church's Corona campus seats 50 people, and it has been permitting only the number of people that allows for effective social distancing. (III-ER-242-243. V. Compl., ¶123.) The Church requires everyone to wear a mask into the building, takes the temperature of everyone entering, and spaces its attendees to

achieve proper social distancing. (*Id.*) The Church also has its building and restrooms professionally sanitized after each worship service. (*Id.*)

The numerous other member Churches of Harvest International Ministries have also taken steps to engage in social distancing, limit the number of attendees, and perform enhanced sanitation protocols for its worship services. (III-ER-243, V. Compl., ¶124.) Together, Harvest Churches are committed to protecting their members and attendees, and surrounding communities, while engaging in their constitutionally protected rights to exercise their sincerely held religious not to forsake the assembling of themselves together, and Harvest Churches are committed to engaging in appropriate social distancing and enhanced sanitation for all of their worship services. (III-ER-243, V. Compl., ¶125.)

D. The Government's Threatened Enforcement Of The Governor's Orders And Threats Of Criminal Prosecution, Fines, Jail, And Closure Of Their Churches.

On August 11, 2020, the Pastor of Harvest Rock Church received a letter from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena threatening criminal penalties, including fines and imprisonment, for being open for worship against the Governor's Orders and local health orders. (II-ER-196-198.) On August 18, 2020, the Pastor of Harvest Rock Church received a letter from the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatening criminal penalties against the Church's

staff and congregants, including fines and imprisonment, and even closure of the Church, for being open for worship against the Governor's Orders and local health orders. (II-ER-186-189.) Specifically, the letter stated: "**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**." (II-ER-189 (emphasis added).) And, those criminal penalties included "punishment of up to one year in jail and a fine **for each violation**." (II-ER-189 (emphasis added).)

II. PROCEDURAL HISTORY.

A. Previous Denial Of Preliminary Injunction, Appeal, And Supreme Court's GVR Order.

Harvest Churches commenced this action on July 17, 2020, four days after the July 13 Health Order banned indoor worship services in most of California. (III-ER-200, V. Compl. ¶1; III-ER-382, V. Compl. Ex. M.) Harvest Churches challenge the Governor' Orders (and all amendments, revisions, supplements, and extensions) as violating their free exercise, assembly, free speech, and Establishment Clause rights under the First Amendment, their equal protection rights under the Fourteenth Amendment, and their Guarantee Clause rights under Article IV, Section 4 of the Constitution. (III-ER-250-267, V. Compl., ¶¶155–265.) At the same time, Harvest Churches pressed their free exercise, assembly, free speech, and Establishment Clause claims in a motion for temporary restraining order (TRO) and preliminary

injunction, seeking to protect their upcoming Sunday worship services on July 19. (Dist. Ct. dkt. 4.) The district court denied the TRO on Monday, July 20 (Dist. Ct. dkt. 5), and convened a hearing on the preliminary injunction over three weeks later, on August 12. The district court announced its denial of the preliminary injunction at the hearing and entered its written order denying the preliminary injunction on September 2, holding that Harvest Churches were unlikely to prevail on the merits of their First Amendment claims. Harvest Churches filed their notice of appeal from the previous order on August 28, in between the district court's announcement and written order of denial.

On appeal in this Court (Case No. 20-55907, *Harvest Rock Church v. Newsom* (9th Cir. 2020)), Harvest Churches sought an IPA enjoining enforcement while the denial of a preliminary injunction was pending on appeal. (No. 20-55907, dkt. 6-1), which this Court denied. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728 (9th Cir. 2020). After this Court's previous denial of an IPA and while the previous preliminary injunction appeal was still pending, the Supreme Court released its decision in *Catholic Diocese*, which this Court has acknowledged represented a "seismic shift in Free Exercise law" in the COVID-19 era. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020). Appellants also sought an emergency writ of injunction from the Supreme Court, seeking to enjoin enforcement of the Governor's Orders while the appeal proceeded in this Court. On

December 3, 2020, the Supreme Court treated Harvest Churches' application as a petition for a writ of certiorari, granted the petition, vacated this Court's IPA denial and the district court's previous denial of a preliminary injunction, and remanded the matter for further consideration in light of *Catholic Diocese*. *See Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630, *1 (U.S. Dec. 3, 2020).

B. Proceedings In The District Court, The IPA Proceedings In This Court, And The Instant Appeal.

The day after the Supreme Court issued its GVR Order in this case, Harvest Churches filed a renewed motion for temporary restraining order and preliminary injunction. (II-ER-178-179.) On December 5, the district court noticed a hearing for December 8. (II-ER-046.) At the request of the Governor (II-ER-041-044), the district court postponed argument on the merits of Harvest Churches' renewed motion, set a briefing schedule, and permitted the Governor to submit more declarations and testimony from his so-called experts. (II-ER-037.) Upon conclusion of the briefing, the district court held oral arguments and an adversarial hearing on Plaintiffs' renewed motion on December 18th. (II-ER-036.)

On December 21, after hearing oral arguments on the merits of Harvest Churches' renewed motion, the district court released it order (I-ER-001-014) denying Plaintiffs' renewed motion and holding that Plaintiffs were not likely to succeed on the merits of their claims. (I-ER-005-013.) Plaintiffs immediately noticed their appeal to this Court (II-ER-033-034) and filed for an IPA in the district court.

(Dist. Ct. dkt. 77.) On December 22, the district court denied Plaintiffs' motion for IPA. (II-ER-032.) That same day, Harvest Churches filed their Emergency Motion for Injunction Pending Appeal with this Court (dkt. 3-1) requesting relief before Christmas Eve worship services. On December 23, this Court issued its order requiring the Governor to file response to Appellants' emergency motion by December 29, and Appellants to submit a reply by December 29. (9th Cir. dkt 4, *Harvest Rock Church. Inc. v. Newsom*, 982 F.3d 1240 (9th Cir. 2020).) On December 29, this Court requested supplemental brief on the Emergency IPA requesting information as to whether the LA County Public Health Order had any impact on the Emergency IPA, whether Appellants were also challenging the Regional Stay at Home Order, and whether Appellants were challenging the singing and chanting prohibition in the Governor's Orders. (9th Cir. dkt. 13.) Both Appellants and the Governor submitted the requested Supplemental Briefs. (9th Cir. dkts. 15, 16.)

On December 31, this Court issued an order scheduling oral argument on the Emergency IPA motion for January 4. (9th Cir. dkt. 20.) At the conclusion of the oral argument on the Emergency IPA, this Court requested supplemental briefing on the Regional Stay at Home Order and its restrictions on religious gatherings as compared to the Blueprint. (9th Cir. dkt. 25.) Both Appellants and the Governor filed the Second Supplemental briefs. (9th Cir. dkts. 28-1, 30-1.) And, Appellants

requested leave and filed a Reply to the Second Supplemental brief. (Dkt. 31-2.) As of the date of the filing of this brief, the IPA is still pending before this Court.

SUMMARY OF THE ARGUMENT

Catholic Diocese represented a "seismic shift in Free Exercise law" in the COVID-19 era. *Calvary Chapel Dayton Valley*, 982 F.3d at 1232. And, what *Catholic Diocese* makes clear is that discriminatory restrictions and prohibitions on religious worship services cannot withstand First Amendment scrutiny. Though many prior decisions of this Court and other courts throughout the country permitted discriminatory restrictions on religious services under the guise of undue deference in the face of a so-called pandemic, the Supreme Court plainly held that such decisions were plainly in error. Indeed, "**even in a pandemic, the Constitution cannot be put away and forgotten**." *Catholic Diocese*, 141 S. Ct. at 68 (emphasis added). As is true here, "[t]he 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." *Id.* And, where – as here – the government imposes a total prohibition on religious worship services indoors, the First Amendment demands injunctive relief. Put simply, "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Id.* at 66. The same is true here, and the district court must be reversed.

STANDARD OF REVIEW

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

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

LEGAL ARGUMENT

I. THE SUPREME COURT AND PRIOR PANELS OF THIS COURT DEMAND A FINDING THAT HARVEST CHURCHES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE EXERCISE CLAIMS.

A. The Discriminatory and Especially Harsh Treatment Imposed On Harvest Churches Under The Blueprint And The Regional Stay At Home Order Violate The First Amendment Under *Catholic Diocese*, This Court's Decisions In *Calvary Chapel Dayton Valley* And *Calvary Chapel Lone Mountain*, And The Decisions Of Every Other Circuit To Address The Issue Post-*Catholic Diocese*.

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 examples of disparate treatment 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**.

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (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.* "[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,

> 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 69 (bold emphasis added; italics original) (Gorsuch, J., concurring). Indeed, in New York, "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 of worship, which is equally present 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 73 (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 Dayton Valley*, 982 F.3d at1233; *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317, 317 (9th Cir. 2020) (same).

As Justice Gorsuch noted, "[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." *Catholic Diocese*, 141 S. Ct. at 70 (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 73 (Kavanaugh, J., concurring), like "a grocery store, pet store, or big-box store down the street." *Id.*

In *Agudath Israel of Am. v. Cuomo*, the Second Circuit similarly noted that while worship services were restricted to 10 or 25 people, other so-called "essential businesses" were permitted without similar restrictions, including grocery stores, hospitals, liquor stores, pet shops, financial institutions, news media, certain retail stores, and construction. No. 20-3572, 2020 WL 7691715, at *2, 7 (9th Cir. Dec. 28, 2020).

In *Monclova Christian Acad. v. Tuledo-Lucas Cnty. Health Dep't*, the Sixth Circuit also noted that certain religious schools were prohibited from gathering for in-person instruction while other nonreligious gatherings were not so restricted, including "gyms, tanning salons, office buildings, and the Hollywood Casino." No. 20-4300, 2020 WL 7778170, at *3 (6th Cir. Dec. 31, 2020).

Judge O'Scannlain, too, observed in the previous appeal in this matter:

> [I]ndoor religious worship services are completely prohibited. . . . Yet, 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) (footnote omitted).

Under the Regional Stay at Home Order, the Governor imposes a total prohibition on religious worship services that is not imposed on so-called "critical infrastructure" sectors. (*See supra* Facts §I.B.3.) The list of exempt activities under the Regional Stay at Home Order contains **29 pages exempting 13 sectors and hundreds of subsectors of gatherings that are not subject to the total prohibition imposed on religious worship services**. (*See* 9th Cir. dkt 28-2, Essential Critical Infrastructure Workers Sector Index). While Harvest Churches' religious worship services are banned if they include 1 person, the following sectors are but a sampling of the 29 pages of 13 categories of exemptions for nonreligious gatherings in other

sectors. **And, many of them are precisely those found to mandate strict scrutiny in *Catholic Diocese* and *Calvary Chapel Dayton Valley*, and none of them can withstand strict scrutiny's most demanding test.**

The Regional Stay at Home Order, like Tier 1 of the Blueprint and the July 13 Order, continues to ban all indoor religious worship no matter the size of the facility while exempting similar congregate secular gatherings—many of which were specifically mentioned as comparables in *Catholic Diocese* and the decisions from this Court and the Second Circuit. Examples include: food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, retail stores, malls, transportation facilities, bus stations, train stations, airports, gambling centers, acupuncture facilities, garages, plants manufacturing chemicals and microelectronics, hardware stores, repair shops, signage companies, accountants, lawyers, insurance agents, pet stores, film production facilities, and more. *See, e.g., Catholic Diocese*, 141 S. Ct. at 66; *id*. at 69 (Gorsuch, J., concurring); *id*. (Kavanaugh, J., concurring); *Calvary Chapel*, 982 F.3d at 1233; *Agudath Israel*, 2020 WL 7691715, at *2; *Harvest Rock*, 977 F.3d at 731 (O'Scannlain, J., dissenting).

The litany of exemptions compared to the total ban on religious assemblies "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Catholic Diocese,* 141 S. Ct. at 66. When compared with

the restrictions of 10 or 25 people at issue in *Catholic Diocese*, the Regional Stay at Home Order violates the First Amendment because a total prohibition is

> 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 applicant's services.

Id. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (same).

The Regional Stay at Home Order includes a minor capacity reduction for retailers, down to 20 percent from 25 percent under Blueprint Tier 1. The fact remains that retailers can operate, but places of worship cannot. "**[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions**." *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (bold emphasis added)). "Rather, once a State has created a favored class of businesses"—which the Regional Stay at Home Order and the Blueprint both do—"the State must justify why houses of worship are excluded from the favored class." *Id.*

And, there is no world in which 29 pages of exempt business sectors creating hundreds of subcategories of exempt secular activities and facilities—all of which were present in *Catholic Diocese*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, *Agudath Israel*, and *Monclova Christian*—can be the least

restrictive means available. "**[T]here is no world in which the Constitution tolerates color-coded executive edicts that open liquor stores and bike shops [and hundreds of other essential businesses] but shutter churches, synagogues, and mosques**." 141 S. Ct. at 72 (Gorsuch, J., concurring) (emphasis added).

B. The Prior Panel Rule Requires A Finding That Discriminatory and Especially Harsh Treatment Imposed On Harvest Churches Under The Blueprint And The Regional Stay At Home Order Violate The First Amendment.

The prior panel rule of this Court requires a holding that the Governor's discriminatory restrictions on Harvest Churches' religious worship services ae subject to, and fail, strict scrutiny. Indeed, "absent a rehearing en banc, **we are without authority to overrule controlling circuit precedent**." *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009) (quoting *Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1018 (9th Cir. 2009) (emphasis added)). *See also Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 959 (9th Cir. 2012) ("a prior panel decision is binding unless intervening Supreme Court or en banc authority compels a contrary conclusions") (cleaned up); *Rodriguez-Martinez v. Holder*, 498 F. App'x 713, 714 (9th Cir. 2012) ("we are not at liberty to overturn a decision of a prior panel").

The Supreme Court's precedent is clear, as is this Court's prior panels that noted *Catholic Diocese* represented "a seismic shift" in the analysis of COVID-19 restrictions on Appellants' religious worship services. *Calvary Chapel Dayton*

Valley, 982 F.3d at 1232. The prior panel rule thus requires a finding that the Governor's restrictions cannot survive strict scrutiny, and nothing the Governor has argued before this Court in the IPA proceedings can even come close to suggesting a contrary result. *Catholic Diocese* and this Court's prior decisions demonstrate the Governor's Blueprint and the Regional Stay at Home Order are riddled with incurable constitutional infirmities. There is no vaccine for the disease of a First Amendment violation.

This Court in *Calvary Chapel Dayton Valley* held that Nevada's COVID-19 restrictions on religious worship services could not survive *Catholic Diocese* and must be enjoined. 982 F.3d at 1233 ("**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. (citation omitted).

The restrictions on religious worship services in *Calvary Chapel Dayton Valley* were **less restrictive** than the total prohibition here under the Regional Stay at Home Order and Tier 1. *Compare id.* (noting that the Nevada restriction imposed a 50-person cap), *with supra* Facts §1.B.2-3 (noting the total prohibition on religious worship services).) Yet, this Court 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 Dayton Valley*, 982 F.3d at 1233 (emphasis added). This Court enjoined the Nevada restrictions. *Id*. The same was true in a separate appeal issued by this Court on the same day. *Calvary Chapel Lone Mountain*, 831 F. App'x at 317 (same).

Those decision are binding on this Court, and they condemn the Governor's Regional Stay at Home Order and Blueprint to their rightful place in the dustbin of constitutional history. The district court must be reversed, and the discriminatory restrictions on religious worship services enjoined as a matter of binding and settled law. The First Amendment demands nothing less.

C. The Regional Stay At Home Order And The Blueprint Also Continue To Impose Internal Discrimination On The Services And Activities Harvest Churches Are Able To Provide In Their Buildings.

While Harvest Churches may not gather with even 1 person for indoor religious worship services (*supra* Sections I.A-B), they may gather in their same buildings with an unlimited number of people to provide social services or

"necessities of life" to feed, shelter, or counsel people. (*See* 9th Cir. dkt. 28-2 at 27 (exempting from the Regional Stay at Home Order all "[w]orkers who support food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals").) This internal discrimination has been present since the original Stay at Home Order of March 19, 2020. (III-ER-283.) It became worse on July 13 when all indoor worship was banned, and the same internal discrimination continues through the Blueprint, and the Regional Stay at Home Order. As Judge O'Scannlain pointed out previously, "even non-worship activities conducted by or within a place of worship are not subject to the attendance parameters" otherwise applicable to places of worship. *Harvest Rock*, 977 F.3d at 734 (O'Scannlain, J., dissenting). Such internal micromanagement of the affairs of Harvest Churches' religious activities is plainly unconstitutional. *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("**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**." (emphasis added)).

D. Under *Catholic Diocese* And This Court's Binding Decision In *Calvary Chapel Dayton Valley*, The Governor's Blueprint And Regional Stay At Home Order Are Subject To And Cannot Survive Strict Scrutiny.

1. The Governor's Orders Substantially Burden Harvest Churches Sincerely Held Religious Beliefs.

Harvest Churches have and exercise sincere religious beliefs, rooted in biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so even more in times of peril and crisis. (III-ER-215-219, V. Compl., ¶¶48–54, 57–58, 65.) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 912 (W.D. Ky. Apr. 11, 2020) (cleaned up) (emphasis added). And Harvest Churches also have and exercise sincere beliefs that obedience to Scripture requires them to sing as, and in, their worship of God. (III-ER-218-219, V. Compl., ¶¶59–64.) Though the Governor might not view church worship services and singing as fundamental to religious exercise—or "Essential Critical" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Governor's Orders prohibiting or restricting Harvest Churches' religious worship services inside their Churches, and prohibiting singing and chanting even where limited worship is allowed, on pain

of criminal sanctions, unquestionably and substantially burdens Harvest Churches' exercise of religion according to their sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added).

Moreover, irreparable harm is not even contested by the Governor. (*See* 9th Cir. dkt. 7-2 at 30 ("The State agrees that Plaintiffs . . . suffer some irreparable injury when prevented from attending services indoors.").)

2. Because The Orders Impose Total Prohibitions And Discriminatory Restrictions On Harvest Churches Religious Worship Services While Leaving Scores Of Nonreligious Gatherings Open Without Restrictions, They Are Not Narrowly Tailored Or The Least Restrictive Means.

Because the Regional Stay at Home Order and the Blueprint are neither neutral nor generally applicable, they must satisfy strict scrutiny, meaning the restrictions must be supported by a compelling interest and narrowly tailored. *Catholic Diocese*, 141 S. Ct. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 ("disparate treatment of religion triggers strict scrutiny"). As the Supreme Court has recognized, this is "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.

Whatever interest the Governor claims, he cannot show the orders are narrowly tailored to be the least restrictive means of protecting that interest. And it is the Governor's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Appellants] 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). Under that standard, "[n]arrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objectives." *Agudath Israel*, 2020 WL 7691715, *8 (quoting *Thomas*, 450 U.S. at 718).

To meet this burden, the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). *See also Agudath Israel*, 2020 WL 7691716, at *8 (same). And the Governor cannot meet the burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined**

and ruled out for good reason," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier.'" *Agudath Israel*, 2020 WL 7691716, at *8 (quoting *McCullen*, 134 S. Ct. at 495).

Since July 13, continuing through the Blueprint, and currently in effect in all Regional Stay at Home Order counties, **the government has imposed a total prohibition on indoor religious worship services**—a total of **190 days** as of the filing of this brief. He tried nothing else and went straight to a total prohibition. That plainly fails the *McCullen* standard.

But, more importantly, binding precedent from *Catholic Diocese* and *Calvary Chapel Dayton Valley* demonstrates that the Governor cannot satisfy his burden here. In *Catholic Diocese*, the Court held that it was "hard to see how the challenged regulations can be regarded as narrowly tailored" because limits of 10 and 25 people 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 applicant's services." 141 S. Ct. at 67. If restrictions of 10 and 25 could not possibly be narrowly tailored, then **the Governor's total prohibitions (which are not similarly imposed on a host of**

nonreligious gatherings) cannot be narrowly tailored as a matter of law. Indeed, it can get no more restrictive than a total prohibition, yet that is what has been in place since July 13.

Additionally, this Court was presented with a 50-person restriction on religious worship services in *Calvary Chapel Dayton Valley*, and it similarly held that such a discriminatory restriction imposed on Churches but not other nonreligious gatherings was not narrowly tailored. 982 F.3d at 1234. Specifically, this Court held that "although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*," the 50-person cap disparately imposed on only religious worship services "is not narrowly tailored" because other gatherings were not subject to the same restriction. *Id. See also Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same).

The Regional Stay at Home Order and Blueprint cannot survive strict scrutiny because they are not the least restrictive means available. As a matter of law, the Governor therefore cannot meet his burden under *Catholic Diocese* and *Calvary Chapel Lone Mountain*. The Governor's restrictions on Appellants' religious gatherings therefore violate the First Amendment, and the district court must be reversed.

E. The Governor's So-Called Experts, And Their Speculative Testimony, Do Not And Cannot Overcome The Binding Decision Of *Catholic Diocese*, Which Rejected The Same Contentions Presented By The Governor In This Matter.

The district court held that the Governor's so-called experts are somehow sufficient to overcome the clear constitutional precedent demonstrating that his Blueprint violates the First Amendment. (I-ER-008-011 (holding that the Governor's total prohibitions are permissible because indoor religious worship services are more dangerous than other nonreligious indoor gatherings.) The district court and the Governor's offensive stereotyping of houses of worship lacks support (and itself borders on animus). Without a shred of evidence, the district court found that Churches are somehow more dangerous than any other gathering and must be prohibited. The court made that astounding claim that churches – even the state-of-the-art concert venue where Pavarotti performed (Harvest Rock Church's Ambassador Auditorium) have less ventilation than every other commercial operation. This is offensive and nonsense.

As Judge O'Scannlain pointed out, the Governor has already "conceded" that his so-called experts are "**not qualified as an expert to opine on what takes place at religious worship services or how people interact there as opposed to in other settings of public life**." *Harvest Rock Church*, 977 F.3d at 735 n.4 (O'Scannlain, J., dissenting) (emphasis added). Yet, despite that fatal concession, the Governor continued to assert below that he can dust off his previously submitted "expert"

testimony and claim it provides the magic bullet for him to escape his rightful constitutional condemnation. He cannot.

Even if the Governor had not conceded that his so-called experts are not experts at all, which he plainly did, the precise arguments those "experts" are making here were presented to the Supreme Court in *Catholic Diocese* and **were rejected**. Thus, despite claiming that Harvest Churches' religious worship services pose 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 Harvest Churches or 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 [Harvest Churches'] services has resulted in the spread of the disease." *Catholic Diocese*, 141 S. Ct. at 68.

Moreover, not a single hypothesis the Governor presented below was unknown by the scientific and governmental communities at the time *Catholic Diocese* was decided. In fact, the precise arguments made by the Governor below and purportedly supported by his "expert" declarants were made to the Supreme Court in *Catholic Diocese*, relied upon by the dissents to suggest the same result the district court reached below, 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. *Catholic Diocese*, 141 S. Ct. at 78 (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 *79 (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)).

As the Second Circuit recognized – equally true here – "the Governor's identification of those risks relied on broad generalizations made by public-health officials about inherent features of religious worship," [but] "the government must normally refrain from making assumptions about what religious worship requires." 2020 WL 7691715, at *8. Moreover,

> Even taking these assertions at face value, however, the Governor must explain why the Order's density restrictions targeted at houses of worship are more effective than generally applicable restrictions on the duration of gatherings or requirements regarding masks and distancing. The Governor may not, of course, presume that religious communities will not comply with such generally applicable regulations.

Id. (emphasis added).

Thus, it is not as though the Governor presented 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 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." 141 S. Ct. at 64. 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*.[4]

F. The Governor's Prohibition On Harvest Churches' Religious Exercise Of Singing And Chanting Violates The First Amendment.

Harvest Churches all have and exercise sincerely held religious beliefs that they are to sing to the Lord in the congregation of believers. (III-ER-218-219, V. Compl. ¶¶ 59–64.) Yet, since July 13 and continuing to this day, the Governor prohibits Harvest Churches from engaging in that sincerely held religious practice. The First Amendment prohibits such infringement. "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)

[4] The Governor also continues to ignore the fact that Harvest Churches submitted expert testimony to the district court below that was relied upon by courts post-*Catholic Diocese*. (*See* 9th Cir. dkt. 8 at 16.)

(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 callous indifference to the constitutional infirmity of banning a deeply-held religious practice of singing to the Lord 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.[5] And, 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**. (III-ER-380 ("Discontinue singing (in rehearsals, services, etc.), chanting, and other practices and performances . . . .").) "**[E]ven in a pandemic, the Constitution cannot be put away and forgotten**." *Catholic Diocese,* 141 S. Ct. at 68 (emphasis added). The prohibition on singing and chanting cannot survive First Amendment review.

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

The district court held that "restrictions on religious activity which are the same as restrictions on secular activity do not constitute government establishment—or disapproval—of religion." (I-ER-013.) This is plainly erroneous

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[5] 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/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.

as a matter of fact and law. It is incorrect as a matter of fact because, as demonstrated *supra* Section I.A-C, the Governor's Orders do not treat religious activity the same as nonreligious activity.

And, it is incorrect as a matter of law because hostility towards and disparate treatment of religious worship services plainly violates the Establishment Clause. "**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**." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Where, as here, Harvest Churches seek to be free from disparate treatment by the State, the very core of the Establishment Clause is at issue. "An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—**the purpose of ensuring governmental neutrality in matters of religion**." *Gillette v. United States*, 401 U.S. 437, 449 (1971) (emphasis added). Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). That mandate of preventing hostility towards religions is equally present in times of exigent circumstances, such as COVID-19. For, as "[a]n instrument of social peace, the Establishment Clause does not become less so when social rancor runs exceptionally

high." *Lund v. Rowan Cnty.*, 863 F.3d 268, 275 (4th Cir. 2017) (emphasis added). "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . **Neither can force nor influence a person to go to or to remain away from church against his will**." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added).

Here, the Regional Stay at Home Order and Blueprint have demonstrated official hostility towards religious worship by completely prohibiting worship *inside churches* in an ever-fluctuating number of counties, and banning the core religious practices of singing and chanting in the counties where indoor worship is still allowed, albeit severely restricted. (*See supra* Facts §I.B.) Moreover, the Governor's total worship ban includes gatherings of small groups for in-home Bible studies or worship. (III-ER-221-228, V. Compl., ¶¶73, 76–77, 94–97.) Violation of the Orders is punishable by criminal citation, and Harvest Churches' pastors can be arrested for simply gathering their congregations for worship services. (III-ER-222, V. Compl., ¶74.) Yet, no such criminal sanction or punishment has been threatened against the thousands of protesters continually gathering in flagrant disregard of the Governor's orders. (III-ER-230-241, V. Compl., ¶¶104–118.) Such openly disparate treatment towards religious exercise constitutes official hostility towards religion in violation of the Establishment Clause.

III. *CATHOLIC DIOCESE* AND *CALVARY CHAPEL DAYTON VALLEY* DEMAND A FINDING THAT HARVEST CHURCHES HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

Irreparable harm is being suffered each and every day Harvest Churches remain subject to the unconstitutional restrictions of the Regional Stay at Home Order and the Blueprint, coupled with daily criminal threats, fines, and closure. No pastor, church, or parishioner in America should have to choose between worship and prison. As Justice Kavanaugh also recognized,

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

Catholic Diocese, 141 S. Ct. at 74 (Kavanaugh, J., concurring) (emphasis added).

"There can be no question that the challenged restrictions, if enforced, will cause irreparable harm." *Id.* at 67. Indeed, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Yet, here, the irreparable harm is even more pronounced for multiple reasons: (1) all of Harvest Churches in Regional Stay at Home Order and Tier 1 Counties are completely prohibited from hosting any religious worship services, regardless of the number in attendance, and

(2) Harvest Churches, and their pastors, staff, and parishioners face threats of ***daily criminal charges*** (each up to one year in prison), ***fines, and closure***.

A. Appellants Suffer Irreparable Harm Each Day The Orders Remain In Place.

"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." *Catholic Diocese*, 141 S. Ct. at 67-68. That alone was sufficient for the Supreme Court to find irreparable harm, and it is all the more true here where Harvest Churches in virtually the entire state of California **are completely prohibited from having any worship service with even one person**. Unlike in *Catholic Diocese* where only "the great majority" of attendees and congregants would be barred, here, **every single attendee is prohibited from attending worship**. And, in *Catholic Diocese*, the Court found that 13 and 7 days was too long to suffer irreparable harm without injunctive relief. *Id.* at 68. Here, Harvest Churches' injury is worse, as they have been suffering the unconscionable and unconstitutional injury of total worship prohibitions for **190 days**.

B. Harvest Churches Suffer Under The Yoke Of Threatened Closure Of Their Churches Every Day The Orders Remain In Place.

Not only are Harvest Churches suffering irreparable harm on their right to worship, but they are also suffering irreparable harm by virtue of the governments' threat to criminally sanction them and **close their Churches**. On August 11, 2020,

the Pastor of Harvest Rock Church received a letter from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena threatening criminal penalties, including fines and imprisonment, for being open for worship against the Governor's Orders and local health orders. (II-ER-189.) On August 18, 2020, the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatened in a letter daily criminal charges and $1,000 fines against the pastors, staff, and parishioners, **including closure of the church**. (II-ER-189.) There is no world where criminalizing and threatening closure of Plaintiffs' Churches comports with the Free Exercise Clause. **Notably, the Governor makes no mention of this astounding threat. And he has done nothing to alleviate these serious threats.**

As in *Catholic Diocese*, "the Governor has fought this case at every step of the way." 141 S. Ct. at 72 (Gorsuch, J., concurring). Indeed, the Governor continues to assert – even before this Court – that the pandemic permits him to impose the **complete prohibitions on indoor religious worship services** and vigorously defends his unconstitutional regime. The same vigorous defense was found by *Catholic Diocese* to warrant intervention, and so, too, should it here. This Court should reject the Governor's continued efforts to impose his unconstitutional regime.

C. Applicants Comply With Safety Protocols.

In *Catholic Diocese*, this Court found it relevant that the applicants were willing to engage in social distancing and enhanced sanitization to protect their congregants. 141 S. Ct. at 66, and that the diocese "had been constantly ahead of the curve, enforcing stricter safety protocols than the State required," *id.*, and that the synagogue "rigorously implemented and adhered to all health protocols." *Id.* The uncontroverted sworn testimony below establishes that Harvest Churches are likewise adhering to social distancing, engaging in enhanced sanitization, and implementing other mechanisms to protect their congregants. Indeed, 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." (III-ER-242, V. Compl. ¶¶120–123; II-ER-040, ¶5.) Moreover, Harvest Rock Church, at all of its campuses, "has its building and restrooms professionally sanitized after hosting each worship service." (III-ER-242, V. Compl. ¶¶120–123; II-ER-040, ¶5.) Harvest International Ministry's member churches in California take the same precautions. (III-ER-242, V. Compl. ¶124; II-ER-040, ¶6.) And, Harvest Churches have not been the source of any outbreak or spread of the virus, just as in *Catholic Diocese*. (II-ER-040, ¶8.)

IV. HARVEST CHURCHES SATISFY THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF.

A. *Catholic Diocese* Compels A Finding That The Balance Of The Harms Favors Injunctive Relief.

As *Catholic Diocese* unequivocally held, where nonreligious gatherings are subject to less restrictive measures than those impose on religious worship services, courts "have a duty to conduct a serious examination of the need for such a drastic measure." 141 S. Ct. at 68. And, as here, "it has not been shown that granting the applications will harm the public." *Id.* Indeed, the State "is in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). But, for Harvest Churches, even minimal infringements upon First Amendment values constitute irreparable injury sufficient to justify injunctive relief. *Catholic Diocese*, 141 S. Ct. at 67; *see also Calvary Chapel Dayton Valley*, 982 F.3d a 1234 (same). As such, there is no comparison between the irreparable loss of First Amendment freedoms suffered by Harvest Churches and the non-existent interest the Governor has in enforcing unconstitutional orders. Absent a preliminary injunction, Appellants "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On*

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

B. *Catholic Diocese* Compels A Finding That The Public Interest Favors Injunctive Relief.

As *Catholic Diocese* and this Court's two prior panels have said, the public interest is best served by enjoining the government from enforcing its discriminatory and unconstitutional restrictions against religious worship services. *Catholic Diocese*, 141 S. Ct. at 68 (holding that the public interest is best served by preserving constitutional rights because "even in a pandemic, the Constitution cannot be put away and forgotten"); *Calvary Chapel Dayton Valley*, 982 F.3d at 1232 n.3 (same); *id.* at 1234; *Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same). The same is true here, and the public interest is best served by protecting the rights of Appellants to engage in their constitutionally protected free exercise of religion. **"[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 453 F. Supp. 3d at 914 (emphasis added).

Moreover, the mounting evidence demonstrates that continued isolation from lockdowns is taking a far greater toll on the public interest than any virus ever could. As the Centers for Disease Control and Prevention (CDC) has reported, COVID-19 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.

Yet, at the same time, a Gallup 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

Because *Catholic Diocese* and *Calvary Chapel Dayton Valley* compel the result in this case, the district court's decision below ignoring that precedent was plainly in error and must be reversed. The First Amendment simply does not tolerate the Governor's never-ending intrusion into Harvest Churches' constitutional liberties and total prohibitions on religious worship services.

Respectfully submitted,

Dated: January 19, 2020

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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.

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