No. 20-56357

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs–Appellants

v.

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

Defendant–Appellee

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

PLAINTIFFS–APPELLANTS' THIRD EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EMERGENY MOTION UNDER CIRCUIT RULE 27-3

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CIRCUIT RULE 27-3 CERTIFICATE

I, Daniel J. Schmid, hereby certify the following:

1. **Identification of Plaintiffs–Appellants' Counsel:** Plaintiffs–Appellants are Harvest Rock Church, Inc. and Harvest International Ministry, Inc, itself and on behalf of its member Churches in California. Appellants are represented by Mathew D. Staver (court@LC.org), Horatio G. Mihet (hmihet@LC.org), Roger K. Gannam (rgannam@LC.org), and Daniel J. Schmid (dschmid@LC.org) of Liberty Counsel. Liberty Counsel's address is P.O. Box 540774, Orlando, FL 32854, and its telephone number is (407) 875-1776. Appellants are also represented by Nicolai Cocis (nic@cocislaw.com) of the Law Office of Nicolai Cocis. His address is 25026 Las Brisas Road, Murietta, CA 92562, and his telephone number is (951) 695-1400.

2. **Identification of Defendant–Appellee's Counsel**: Defendant–Appellee is Gavin Newsom, in his official capacity as the Governor of the State of California. Appellee is represented by Todd Grabarsky (todd.grabarsky@doj.ca.gov) and Seth Goldstein (seth.goldstein@doj.ca.gov) of the Office of the Attorney General for California. Counsel's address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244, and their telephone number is (916) 210-6063.

3. **Emergency Relief Requested in Motion:** The relief requested in the emergency motion that accompanies this certificate is an injunction pending appeal ("IPA") restraining and enjoining Governor Newsom, during the pendency of the above-captioned appeal, from enforcing or applying his Covid-19 Executive Orders and directives against Appellants such that:

> (a) Governor Newsom, all State officers, agents, employees, attorneys, and all other persons in active concert or participation with them, are restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the Governor's Orders or any other future order to the extent any such order discriminates against and imposes especially harsh treatment of Appellant's religious worship services in Tier 1 of the Blueprint by imposing a 25% capacity restriction on Appellants' religious worship service while **exempting numerous nonreligious sectors, industries, and gatherings from all numerical or percentage caps**,[1] and

[1] The Governor's Blueprint **exempts** the following sectors, industries, and gatherings **from all numerical or capacity restrictions whatsoever**: food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector

discriminatorily permitting other nonreligious gatherings to operate at 50% capacity. Many of these comparable nonreligious gatherings have been explicitly named by the Supreme Court as evidence of discriminatory treatment when compared to religious gatherings at places of worship. *See infra* Section I.A-C;

(b) Governor Newsom, all State officers, agents, employees, attorneys, and all other persons in active concert or participation with them, are restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the Governor's Orders or any other future order to the extent any such order discriminates against and imposes especially harsh treatment of Appellant's religious worship services in Tier 2 of the Blueprint by imposing a 25% capacity restriction on Appellants' religious worship service while **exempting numerous nonreligious so-called "critical infrastructure" gatherings from all numerical or percentage caps**,[2] and discriminatorily permitting other nonreligious gatherings to operate at 50% capacity;

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businesses and operations, government operations. (*See* dkt. 40, Opening Br. at 7–10.) (*See also* Addendum to Second Motion for Injunction Pending Appeal.)

[2] *See supra* note 1.

(c) Governor Newsom, all State officers, agents, employees, attorneys, and all other persons in active concert or participation with them, are restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the Governor's Orders or any other future order to the extent any such order discriminates against and imposes especially harsh treatment of Appellant's religious worship services in Tiers 3–4 of the Blueprint by imposing a 50% capacity restriction on Appellants' religious worship service while **exempting numerous nonreligious so-called "critical infrastructure" gatherings from all numerical or percentage caps**;[3] and in addition to those exemptions in all Tiers, adding grocery stores, essential retail stores (*e.g.*, Walmart, Costco, and other 'big-box' stores), shopping centers, malls, destination centers, and swap meets to the list **of entities that have no numerical or percentage capacity limitations whatsoever in Tiers 3–4**. (*See* Addendum Chart at 1); and

(d) Governor Newsom, all State officers, agents, employees, attorneys, and all other persons in active concert or participation with them, are restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with

[3] *See supra* note 1.

the Governor's Orders or any other future order to the extent any such order impermissibly and discriminatorily imposes a prohibition on singing and chanting in religious worship services that is not similarly imposed on all nonreligious gatherings. Since July 6, 2020 and continuing until a mere few days ago, the Governor has completely prohibited singing and chanting only in religious worship services while exempting the music, film, and television industries from similar prohibitions, and though he has recently lessened certain restrictions on religious worship services (*i.e.*, permitting 10 people to sing on stage but not congregants), he still exempts music, film, and television productions from any numerical restrictions whatsoever. Thus, in every Tier and in every aspect of Appellants' religious services, they are treated les favorably than other nonreligious sectors, industries, and gatherings.

4. **Facts Justifying Emergency Relief**: This Court should reaffirm what it explicitly stated in *Calvary Chapel Dayton Valley v. Sisolak*: that the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), "represented a seismic shift in Free Exercise law, and compels the result in this case." 982 F.3d 1228, 1232 (9th Cir. 2020). In fact, a failure to reach the result compelled by *Catholic Diocese* has but one inevitable result—another reversal by

the Supreme Court. As Justice Gorsuch stated in *South Bay United Pentecostal Church v. Newsom*, "[t]oday's orders should have been needless; **the lower courts in these cases should have followed the extensive guidance that this Court already gave**." 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement) (emphasis added).

5. Unfortunately, some lower courts—including this Court in *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021); *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021); *Gish v. Newsom*, 985 F.3d 891 (9th Cir. 2021), and *Gateway City Church v. Newsom*, No. 21-151899, 2021 WL 781981 (9th Cir. Feb. 12, 2021)—are still not following the Supreme Court's clear and unequivocal roadmap laid out in *Catholic Diocese* and have refused to issue injunctive relief against discriminatory restrictions on religious worship services. Notably, the Supreme Court's emergency injunctive relief in *Harvest Rock* came after it had already vacated this Court's prior denial of injunctive relief. *See Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020).

6. And, every lower court order denying injunctive relief despite *Catholic Diocese*—including two in the case at bar—has met with the same fate: a Supreme Court order granting certiorari, vacating the denial of injunctive relief, and remanding with instructions to follow *Catholic Diocese*. *See South Bay*, 141 S. Ct.

716; *Harvest Rock Church*, 2021 WL 406257; *Harvest Rock Church*, 2020 WL 7061630; *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb, 26, 2021); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same).

7. The need for additional injunctive relief pending appeal could not be more evident in this case. There is no universe in which the Supreme Court **twice** rebukes the lower courts' denials of injunctive relief, as it has done in this case, without a clear violation of Appellants' First Amendment rights. *See Harvest Rock Church*, 2020 WL 7061630 (vacating district court's denial of preliminary injunction and remanding in light of *Catholic Diocese*); *Harvest Rock Church*, 2021 WL 406257, at *1 (granting injunction pending appeal against the Governor's discriminatory restrictions on religious worship). And, if any doubt remained, it was laid to rest in *Gateway City* when the Supreme Court made clear that this Court's refusal to enjoin discriminatory restrictions on religious worship was plainly "erroneous." 2021 WL 753575, at *1.

8. If a refusal to follow the clear dictates of the Supreme Court's *Catholic Diocese*, *Harvest Rock Church*, and *South Bay* decisions is clearly erroneous, as it is, it was necessarily an abuse of discretion to decline enjoining the Governor's discriminatory restrictions on Plaintiffs' religious worship services. **Indeed, a**

clearly erroneous legal conclusion is the definition of an abuse of discretion. *See Escobar v. Bowen*, 857 F.2d 644, 645 n.1 (9th Cir. 1988) (noting that "[a]n abuse of discretion occurs if the district court based its decision on an erroneous legal conclusion"); *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (same). Thus, if the Supreme Court has already said a decision not to enjoin the Governor's restrictions in the instant litigation was clearly erroneous—which it did, *Gateway City*, 2021 WL 753575, at *1—and the textbook definition of an abuse of discretion is reaching an erroneous legal conclusion—which it is, *Escobar*, 857 F.2d at 645 n.1—then the district court's refusal to apply *Catholic Diocese* and enjoin the Governor's discriminatory and unconstitutional restrictions on Plaintiffs' religious worship services is *ipso facto* an abuse of discretion. The Governor's discriminatory restrictions on religious worship services must be enjoined pending appeal.

9. Plaintiffs have scratched and clawed for **lasting** relief for **259 days**, and this Court should issue an injunction pending appeal against the Governor's continued imposition of discriminatory restrictions on religious worship services while exempting myriad secular gatherings from any restrictions whatsoever and permitting other nonreligious gatherings and industries to meet with more favorable capacity restrictions than those imposed on Appellants' religious worship services. Indeed, without a preliminary injunction beyond the current injunctions pending appeal, "nothing would prevent the Governor from reinstating the challenged

restrictions tomorrow," which would be "just another sacrifice of fundamental rights in the name of judicial modesty." *Catholic Diocese*, 141 S. Ct. at 71–72 (Gorsuch, J., concurring). Put simply, the Supreme Court has "**made clear that it would no longer tolerate such departures from the Constitution**." *Danville Christian Academy v. Beshear*, 141 S. Ct. 527, 530 (2020) (Gorsuch, J., concurring) (emphasis added).

10. The result in the instant matter is clear: the Governor's discriminatory treatment of religious worship services **in every Tier and continuing after the Supreme Court's numerous injunctions against the Governor's unconstitutional edicts** violates the First Amendment and must be enjoined beyond the current injunctions pending appeal. The time has come to put a stop to the constant discrimination Plaintiffs have faced for the last year. Judge O'Scannlain has been correct since October 1, 2020 when he said, "[b]ecause California's COVID-19 regulations patently disfavor religious practice when compared to analogous secular activities, I believe that the church is quite likely indeed to succeed on the merits of its challenge to such regulations." *Harvest Rock Church v. Newsom*, 977 F.3d 728, 733 (9th Cir. 2020) (O'Scannlain, J., dissenting). And, after six months and a host of Supreme Court decisions, Judge O'Scannlain's initial conclusion has proved correct time and again, including twice in the case at bar.

11. Plaintiffs have demonstrated a clear and indisputable right to relief **twice** at the Supreme Court, and that necessarily means they are likely to succeed on the merits of their claims here. With each day that passes, **now numbering 259**, Appellants are suffering immediate and irreparable injury to their cherished First Amendment liberties, which is unquestionably irreparable harm. *See Elrod v. Burns*, 427 U.S. 347 (1976). Appellants have been subject to complete prohibitions and severe restrictions for ten months, have been forced to choose between jail and attending Church on the Holy Days of Easter and Pentecost, missed another Holy Season of Christmas, and **are now going through yet another Holy Season of Palm Sunday and Easter** while under the constant threat of criminal sanction for violating the Governor's unconstitutional restrictions on their religious worship services. Enough is enough.

12. Appellants are currently subject to more onerous restrictions in every Tier of the Blueprint for their religious worship services. Additionally, Appellant Harvest Rock Church has received several letters from government officials threatening criminal sanctions for the exercise of its constitutionally protected right of free exercise of religion. The Planning and Community Development Department, Code Enforcement Division, of the City of Pasadena has threatened to impose criminal fines and even imprison Harvest Rock Church's pastor for holding religious services. The Criminal Division of the City Attorney/City Prosecutor for the City of

Pasadena has likewise threatened Harvest Rock Church with criminal sanctions, stating that each time Harvest Rock Church meets constitutes a separate violation subject to exorbitant monetary penalties and jail time. Yet, at the same time, the Governor and other government officials in California have encouraged, supported, and advocated for the gathering of hundreds of thousands of protesters throughout California with no threat of criminal penalty and have exempted whole swaths of nonreligious gatherings from any numerical or capacity restrictions whatsoever **in every Tier**, and permit other gatherings to operate at more favorable capacity restrictions than Appellants' religious worship services **in every Tier**.

13. As the Supreme Court's decisions in *South Bay* and *Harvest Rock Church* make clear, further injunctive relief is appropriate if Appellants demonstrate that the remaining aspect of the regulatory regime—in addition to the other restrictions already enjoined by the Supreme Court and this Court—are continuing to discriminate against religious worship services. Indeed, the Supreme Court's injunctions made clear that they were "without prejudice to the applicants presenting new evidence . . . that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner." *Harvest Rock Church*, 2021 WL 406257, *1; *South Bay*, 141 S. Ct. at 716 (same). As demonstrated *infra*, the Governor is not applying those restrictions in a generally applicable manner, and further injunctive relief pending appeal is necessary.

14. **Timeliness**: Appellants could not have filed this motion sooner because the need for further injunctive relief pending appeal did not become apparent until this Court issued its initial calendar indicating that oral argument on Appellants' appeal is being considered but might not take place until July, August, or even September. (Dkt. 62.) Given the amount of time between the conclusion of the briefing on March 18, 2021 (dkt. 63), and the oral argument to take place at the end of the summer or later, Appellants would suffer under a regime of discriminatory restrictions for several more months. Indeed, the merits of Appellants' appeal are now fully briefed and pending before this Court (dkt. 63), and the range of options provided for oral argument are July 6–9 or 26–30, August 2–6, August 30–September 3, or September 13–14 (dkt. 62). It was not until the Court's Order of March 18 (dkt. 63) disclosed this schedule that the need for further injunctive relief became clear to Appellants. And, throughout the entire time from the conclusion of briefing, through the eventual oral argument, and until an opinion can be written, Appellants are suffering irreparable harm every day. The First Amendment demands further injunctive relief for that period, and—at minimum—an expedited oral argument schedule.

15. **Conference with Opposing Counsel:** Prior to filing this motion, counsel for Appellants informed counsel for Appellee of the motion, and that upon filing Appellants would serve a true and correct copy on Appellee by electronic mail

(in addition to the electronic service effectuated by the Court's ECF system). Counsel for Appellee presumes that Appellee opposes the motion.

16. **Notification of Court:** Immediately upon the filing of the Emergency Motion, counsel for Plaintiffs–Appellants notified the Clerk's emergency contact email informing the Court of the filing of the instant motion.

Dated: April 2, 2021

/s/ Daniel J. Schmid

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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: April 2, 2021

/s/ Daniel J. Schmid

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"Recently, this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution. . . . Today's order should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave. "[4]

RELIEF SOUGHT

Plaintiffs–Appellants, HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California, hereby move the Court for a second injunction pending appeal (IPA) from the district court's December 21, 2020 Order Denying Plaintiffs' Motion for TRO and Preliminary Injunction (dkt. 3-3), which is the subject of the instant appeal, enjoining Governor Newsom, during the pendency of this appeal, from enforcing or applying his Blueprint against Appellants in such a way that infringes upon Appellants' First Amendment liberties by, *inter alia,* (1) imposing 25% capacity restrictions on Appellants' religious worship services while exempting broad swaths of sectors, industries, and gatherings from any numerical or capacity restrictions whatsoever and providing other nonreligious gatherings, sectors, and industries with more favorable capacity restrictions in Tiers 1–2; (2) imposing 50% capacity restrictions on Appellants' religious worship services while exempting virtually every other sector, industry, and gathering from any numerical or capacity restrictions whatsoever in Tiers 3–4; and (3) imposing his discriminatory singing

[4] *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement) (emphasis added).

and chanting prohibition on religious worship services while permitting other nonreligious sectors and industries to engage in singing and chanting with more favorable limitations than those applicable to religious worship services.

JURISDICTION AND TIMING

As detailed in the Rule 27-3 Certificate, *supra*, the district court denied Plaintiffs' motion for TRO and PI on December 21, 2020. (Dkt. 3-3.) In compliance with Fed. R. App. P. 8(a)(1)(C), Appellants first filed for an IPA in the district court on December 21, requesting expedited consideration and decision. On December 22, the district court denied Plaintiffs' motion for an IPA. (Dkt. 3-2.) Appellants sought all relief from the district court, but received none of the requested relief. Additionally, Appellants requested relief from this Court previously, and received a partial grant on an injunction pending appeal following the Supreme Court decisions in *South Bay* and *Harvest Rock Church*. Because of the Supreme Court's statements in *South Bay* and *Harvest Rock Church* that Appellants were given an IPA without prejudice to their seeking further injunctive relief on appeal, *Harvest Rock Church*, 2021 WL 406257, *1; *South Bay*, 141 S. Ct. at 716, this Court has jurisdiction to grant the IPA. *See* Fed. R. App. P. 8(a)(2)(A)(ii).

INTRODUCTION

For the third time, Appellants ask to this Court to do what the Constitution demands (and has demanded since the initiation of the instant lawsuit, **259 days**

ago): enjoin the Governor from enforcing his discriminatory COVID-19 restrictions that impose draconian and unconscionable restrictions on religious worship services while exempting myriad secular businesses and gatherings from similar restrictions. The First Amendment prohibits the discriminatory regime under which Appellants have been suffering for **259 days**. Indeed, "**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) (*Catholic Diocese*) (emphasis added).

The Supreme Court's decisions in *Catholic Diocese*, *South Bay*, *Harvest Rock Church*, and *Gateway City* and the decisions of the circuit courts post-*Catholic Diocese* compel a single result: **the Governor's continued discriminatory restrictions on Appellants' religious worship services violate the First Amendment and must be enjoined**. As this Court recently held, *Catholic Diocese* "**represented a seismic shift in Free Exercise law**, and compels the result in this case." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) (emphasis added). And when two panels of this Court refused to follow *Catholic Diocese*, Justice Gorsuch expressed the Supreme Court's frustrations: "Today's orders should have been needless; **the lower courts in these cases should have followed the extensive guidance this Court already gave**." *South Bay*, 141 S. Ct. at 719 (Gorsuch, J.,) (emphasis added). Though for some courts, the First Amendment was seemingly placed on "a holiday during this pandemic, **it cannot**

become a sabbatical. . . . [C]ourts must resume applying the Free Exercise Clause." *Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) (emphasis added).

The conclusion here is simple: **percentage caps imposed on religious services while other nonreligious gatherings of like kind are not subject to any numerical or percentage capacity restrictions whatsoever, or that are more favorable to certain nonreligious gatherings than Appellants' worship services, cannot withstand strict scrutiny**. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 65 (enjoining New York's discriminatory 10 and 25-person caps on religious worship services); *South Bay*, 141 S Ct. at 716 (enjoining California's total prohibition on religious worship services); *Harvest Rock Church*, 2021 WL 406257 at *1 (same); *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (enjoining Nevada's 50-person cap on religious worship services); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020) (same); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d. Cir. 2020) (enjoining New York's discriminatory 10 and 25-person cap on religious worship services); *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1151 (9th Cir. Jan. 22, 2021) (enjoining California's 100 and 200-person caps on religious worship services); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (enjoining California's 100 and 200-person caps on religious worship services).

Since the November 25 decision in *Catholic Diocese*, the Supreme Court has vacated **every order** presented to it upholding discriminatory restrictions on places of worship, including in the case at bar. *See, e.g.*, *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (granting a petition for certiorari, vacating the lower court's denials of injunctive relief, and remanding for consideration in light of *Catholic Diocese*); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same); *Gateway City*, No. 20A138, 2021 WL 753575 (U.S. Feb, 26, 2021).

And, if there was any doubt that discriminatory percentage caps are no longer permissible post-*Catholic Diocese*, *South Bay*, and *Harvest Rock Church*, the recent decision in *Roman Catholic Archbishop of Washington v. Bowser*, No. 20-cv-3625 (TNM), 2021 WL 1146399 (D.D.C. Mar. 25, 2021) lays that to rest. There, the court noted the Supreme Court's confirmation that restrictions against religious worship services demand injunctive relief, stating that "[t]he Supreme Court confirmed as much in its recent grant of injunctive relief in *Gateway City Church v. Newsom*, where it explained that 'the Ninth Circuit's failure to grant relief was erroneous.'" 2021 WL 1146399, *6 n.5 (citing No. 20A138, 2020 WL 753575, at *1 (U.S. Feb. 26, 2021)). However, most fatally for the Governor here, the restrictions at issue in

Roman Catholic Archbishop were identical to the 25% cap at issue here. Indeed, the court enjoined the District's restrictions, which imposed a 25% or 250-person cap on religious worship. *Id.* at *7. Specifically, because restrictions more favorable than 250 people or 25% have been employed in other jurisdictions, the court concluded that the District of Columbia had not deployed the least restrictive means. *Id.* at *10 ("**[T]he regulations in other jurisdictions—especially in neighboring ones—make it harder for the District to meet its burden that the means chosen are the least restrictive**." (emphasis added)). **If a 250-person limit cannot survive strict scrutiny, there is no world in which the discriminatory capacity restriction in every California Tier can withstand the binding decisions of the Supreme Court's decisions in *Catholic Diocese, South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Harvest Rock Church v. Newsom*, No.20A137, 2021 WL 406257 (U.S. Feb. 5, 2021).**

As the *Roman Catholic Archbishop* court made clear, discriminatory restrictions on religious worship "represent[] a fundamental misunderstanding of the government's role in crafting public health restrictions that infringe on constitutionally protected rights. **Broad brush strokes are fine for business regulations, but not for restricting the free exercise of religion**." 2021 WL 1146399, at *13 (emphasis added). Thus, the court concluded, "the Court finds that

the 250-person cap and the 25 percent capacity limit . . . are not narrowly tailored." *Id.*

The Governor cannot continue to impose his discriminatory 25% capacity restrictions in Tiers 1–2 and 50% capacity restriction in Tiers 3–4 while exempting myriad sectors, industries, and gatherings identical to those present in the binding decisions of the Supreme Court or providing other nonreligious gatherings with more favorable capacity restrictions than those applied to Appellants' religious worship services. Additionally, the Governor cannot continue to prohibit or numerically restrict singing and chanting in religious worship services while exempting the music, film, and television industries from similar restrictions. An injunction pending appeal is necessary to prevent the ongoing discrimination against Appellants' religious worship services in every Tier of the Blueprint. And, as the Supreme Court made clear in *Gateway City*, a failure to enjoin discriminatory restrictions against religious worship services is clearly "erroneous." *Gateway City*, 2021 WL 753575, at *1.

LEGAL ARGUMENT

"The standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Feldman v. Az. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016). Thus, to obtain an IPA, Appellants need to demonstrate a likelihood of success on the merits,

irreparable injury absent an IPA, that the balance of the equities warrants an IPA, and that the public interest is served by the IPA. *Se. Alaska Cons. Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Under the binding precedent of *Catholic Diocese* and this Court's two binding injunctions in *Calvary Chapel Dayton Valley* and *Calvary Chapel Lone Mountain*, Appellants easily satisfy these requirements.

I. THE SUPREME COURT'S DECISIONS IN *CATHOLIC DIOCESE*, *SOUTH BAY*, *HARVEST ROCK CHURCH*, AND *GATEWAY CITY* ALL DEMAND A FINDING THAT APPELLANTS HAVE AN INDISPUTABLE RIGHT TO RELIEF FROM THE GOVERNOR'S CONTINUING DISCRIMINATORY RESTRICTIONS IN EVERY TIER OF THE BLUEPRINT.

A. The Supreme Court in *South Bay* and *Harvest Rock Church* Already Determined That All Capacity Restrictions on Religious Worship Services in California Violate the First Amendment and Should Be Enjoined.

A clear majority of the Supreme Court has already found that the Governor's capacity restrictions on religious worship are unconstitutional. In *South Bay*, which addressed the very restrictions at issue in the instant appeal, five Justices all concluded that the capacity restrictions were discriminatory and should be enjoined. *South Bay*, 141 S. Ct. at 716 (noting that Justices Thomas and Gorsuch would have granted the applications in full, including the regime of capacity restrictions in each Tier at issue here); *id.* (noting that Justice Alito would have granted the applications in full but given the state 30 days to present evidence supporting the necessity of its

capacity restrictions); *id.* at 717 (Barrett, J., and Kavanaugh, J., concurring in part) (noting their only hesitation in granting the applications in full was the singing and chanting prohibition); *id.* at 717–18 (Gorsuch, J., joined by Thomas, J. and Alito, J., concurring in part) (explaining why the entire regime is unconstitutional).

Though the opinion was splintered in *South Bay*, the breakdown of the Justices' votes and opinions demonstrates that the second injunction pending appeal should issue as to the discriminatory capacity restrictions on religious worship services in every Tier of the Blueprint. As Justice Gorsuch stated, "[s]ince the arrival of COVID-19, California has openly imposed more stringent regulations on religious institutions than on many businesses." 141 S. Ct. at 717 (Gorsuch, J., joined by the Thomas, J. and Alito, J.) In fact, as is still true to this day, "[t]he State's spreadsheet summarizing its pandemic rules even assigns places of worship their own row," and "**is the only State in the country that has gone so far as to ban *all* indoor religious services**." *Id.* (bold emphasis added). He continued,

> Of course we are not scientists, but **neither may we abandon the field when government officials with experts in tow seek to infringe constitutionally protected liberty.** The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. . . . **Even in times of crisis—perhaps *especially* in time of crisis—we have a duty to hold governments to the Constitution**.

Id. at 718 (bold emphasis added). In short, California failed to "explain why it cannot address its legitimate concerns with rules" that do not discriminate against religious

worship services, and those failures "**are telltale signs that this Court has long used to identify laws that fail strict scrutiny**." *Id.* (emphasis added).

Justice Gorsuch concluded, which is equally true today under the new restrictions and discriminatory percentage caps, "**[w]hen a State so obviously targets religion for different treatment, our job becomes much clearer**." *Id.* at 717 (emphasis added). And, because that job was much clearer due to the Governor's overt hostility towards religion in every Tier, Justice Gorsuch and Justice Thomas would have voted to grant the applications "in full," which would have enjoined the Governor's discriminatory total ban on religious worship as well as the discriminatory percentage restrictions which are still in place today. *Id.* at 716.

Justice Alito, in turn, "would grant the applications **with respect to all of the capacity restrictions on indoor worship services**," but would have stayed the injunction for 30 days. *Id.* (Alito, J., concurring). His only divergence from Justices Thomas and Gorsuch's vote to enjoin the entire discriminatory scheme was to permit the State 30 days to "demonstrate[] clearly that nothing short of those measures will reduce the community spread of COVID-19 at indoor religious gatherings to the same extent as do the restrictions the State enforces with respect to other activities it classified as essential." *Id.* Given that the State has had more than 30 days since the Supreme Court issued its decision and the Governor has put forward no further evidence or demonstrations why religious worship services should be subject to

more discriminatory restrictions and percentage capacity limitations, Justice Alito would likewise enjoin the Governor's discriminatory reign of terror over houses of worship.

Finally, in addition to the three votes to enjoin all discriminatory percentage capacity restrictions by Justices Thomas, Gorsuch, and Alito, Justices Barrett and Kavanaugh likewise agreed with Justice Gorsuch's opinion that such discriminatory restrictions should be enjoined. Indeed, Justice Barrett's opinion, which was joined by Justice Kavanaugh, "agree[d] with Justice Gorsuch's statement, save its contention that the Court should enjoin California's prohibition on singing and chanting during indoor services." *Id.* at 717 (Barrett, J., with Kavanaugh, J.). Both Justices Barrett and Kavanaugh would likewise have voted to grant the applications "in full," which would have enjoined the Governor's discriminatory total ban on religious worship as well as the discriminatory percentage restrictions which are still in place today. *Id.* at 716 (Gorsuch, J.).

Thus, a clear majority of the Supreme Court has already found—with respect to the precise regulations at issue in this appeal—that the State's discriminatory restrictions, **including the current discriminatory capacity restrictions in every Tier**, violate the First Amendment and that Plaintiffs demonstrated a clear and indisputable right to relief. *Catholic Diocese*, 141 S. Ct. at 66 (noting that "applicant have clearly established their entitlement to relief"); *South Bay*, 141 S. Ct. at 716

(enjoining California's discriminatory total prohibition on religious worship services); *Harvest Rock Church*, 2021 WL 406257, at *1 (same). As shown *infra*, the discriminatory regime found unconstitutional by the Supreme Court in each of its triumvirate COVID-19 decisions on religious worship is still present in every Tier today, and the second IPA should issue.

B. In Contrast to the 25 or 50 Percent Capacity Restrictions Imposed on Appellants' Religious Gatherings in the Respective Tiers, the Governor Exempts Myriad Industries and Sectors from All Numerical or Capacity Restrictions.

Despite subjecting Appellants' religious worship services to 25% capacity in Tiers 1–2 and 50% capacity in Tiers 3–4, the Governor's Blueprint **exempts** the following sectors, industries, and gatherings **from all numerical or capacity restrictions**: food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations. (*See* dkt. 40,

Opening Br. at 7–10.) (*See also* Addendum to Motion for Injunction Pending Appeal, "Addendum Chart".)

These exempt sectors, industries, and gatherings are identical to those the High Court found relevant in *Catholic Diocese*. *See* 141 S. Ct. at 66 ("acupuncture facilities, camp grounds, garages, as well as . . . **plants manufacturing chemicals and microelectronics and all transportation facilities**" (emphasis added)). *See also id.* at 69 (Gorsuch, J., concurring) (noting that "hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents" are all exempt); *id.* at 73 (Kavanaugh, J., concurring) (noting the exemptions for "grocery store, pet store, or big-box store down the street"). Yet despite the Supreme Court's clear holding that such discrimination is a direct violation of the First Amendment, **the Governor continues to exempt these same industries, sectors, and gatherings in every Tier of the Blueprint.** There is no longer any question that the First Amendment prohibits the discriminatory percentage caps that are present in every Tier of the Blueprint to this day, and the IPA should issue.

C. The Governor's Discriminatory Capacity Restrictions in Tier 1 Single Out Appellants' Religious Worship Services for Especially Harsh Treatment and Should Be Enjoined Pending Appeal.

In Tier 1, while the total prohibition has been enjoined, discriminatory percentage restrictions still single out religious worship for especially harsh

treatment in direct contradiction to *Catholic Diocese*. Indeed, even now, the State restricts religious worship services to 25% capacity. (*See* dkt. 51, Answer Br. at 26 (citing Cal. Dep't of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Places of Worship and Cultural Ceremonies").) **Yet, there are still myriad activities that are not restricted to 25% capacity, many of which the Supreme Court has specifically and consistently held represent unconstitutional discrimination**. (*See supra* Section I.B.) Indeed, food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations are all **exempt from all numerical or capacity restrictions** in California. (*Id.*) (*See also* Addendum Chart at 1.) Grocery stores and certain other retail stores are permitted to operate at 50% capacity. (*Id.*) Thus, even under the revised orders issued after three separate injunctions from the Supreme Court, California still misses the mark with its discriminatory percentage restrictions on religious worship services.

It does not matter that the current restrictions are more favorable than the flatly unconstitutional total ban enjoined by the Supreme Court, so long as the current regime still treats Plaintiffs' Churches less favorably than other nonreligious gatherings. *Catholic Diocese*, *South Bay*, and *Harvest Rock Church* all compel further injunctive relief now. Indeed,

> under [the Supreme] 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. . . . . **Rather, once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class**.

Catholic Diocese, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (emphasis added).

Because California still limits religious worship services to 25% capacity while exempting large swaths of other industries from any restriction at all and permits grocery stores and certain other retail to operate at 50% capacity, the State is still discriminating against religious worship services in violation of the First Amendment. The First Amendment demands further injunctive relief.

D. The Governor's Discriminatory Capacity Restrictions in Tier 2 Single Out Appellants' Religious Worship Services for Especially Harsh Treatment and Should Be Enjoined Pending Appeal.

The percentage capacity restrictions are also unconstitutionally discriminatory against religious worship services in Tier 2. As the Supreme Court noted in both *South Bay* and *Harvest Rock Church*, the injunction was without prejudice to

showing that the percentage capacity restrictions in other Tiers are also discriminatory. *South Bay*, 141 S. Ct. at 716; *Harvest Rock Church*, 2021 WL 406257, at *1. *See also South Bay*, 141 S. Ct. at 719 n.1 ("nothing in our order precludes future challenges to the other disparate occupancy caps applicable to places of worship, particularly in 'Tiers' 2 through 4) (Gorsuch, J., statement)). **And, the percentage capacity restrictions in Tier 2 are still discriminatory**.

Just as in Tier 1, food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations are all **exempt from any numerical or capacity restrictions whatsoever in Tier 2**. (*See supra* Section I.B) (*See also* Addendum Chart at 1.) Grocery and "essential" retail stores (e.g., Walmart, Costco, and 'big-box' stores) in Tier 2 may operate at 50% capacity (II-ER-054-055).

Yet, despite these exemptions and more favorable restrictions, Churches in Tier 2 are still restricted to 25% capacity for indoor worship. (II-ER-049.) Tier 2

thus singles out religious worship services for especially harsh treatment and therefore violates the First Amendment. *See Catholic Diocese*, 141 S. Ct. at 66.

E. The Governor's Discriminatory Capacity Restrictions in Tiers 3–4 Single Out Appellants' Religious Worship Services for Especially Harsh Treatment and Should Be Enjoined Pending Appeal.

Just as in Tiers 1–2, food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations are all **exempt from any numerical or capacity restrictions whatsoever in Tiers 3–4**. However, in addition to those exemptions in all Tiers, Tiers 3–4 add insult to constitutional injury by adding grocery stores, essential retail stores (*e.g.*, Walmart, Costco, and other 'big-box' stores), shopping centers, malls, destination centers, and swap meets to the list **of entities that have no numerical or percentage capacity limitations whatsoever**. (*See* Addendum Chart at 1.)

For Churches, however, Tiers 3–4 continue to impose a discriminatory 50% capacity restriction for indoor worship. (Addendum Chart at 1.) (*See also* II-ER-

050.) Thus, Tiers 3–4 single out religious worship services for especially harsh treatment and violate the First Amendment. *See Catholic Diocese*, 141 S. Ct. at 66. As Judge O'Scannlain made clear: "**A simple, straightforward application of these controlling cases compels what should be the obvious result here: California's uniquely severe restrictions against religious worship services . . . are patently unconstitutional and should be enjoined**." *Harvest Rock Church*, 985 F.3d at 772 (O'Scannlain, J., concurring) (emphasis added). **That remains equally true today, 259 days into Appellants' constitutional orphanage**. Further injunctive relief is needed to prevent the discriminatory treatment of Appellants' religious worship services under the Governor's Blueprint.

II. THE GOVERNOR'S DISCRIMINATORY PROHIBITION ON SINGING AND CHANTING IN RELIGIOUS WORSHIP SERVICES VIOLATES THE FIRST AMENDMENT AND SHOULD BE ENJOINED.

The Supreme Court explicitly left the door open for further injunctive relief against the Governor's singing and chanting prohibition if Appellants showed that it, too, was being applied discriminatorily. *South Bay*, 141 S. Ct. at 716 (noting that the injunction was without prejudice as to Plaintiffs' showing that the State was not applying "the prohibition on singing and chanting in a generally applicable manner"); *Harvest Rock Church*, 2021 WL 406257, at *1 (same). Thus, if the State is not applying the restrictions on singing and chanting evenly, which it is not, those challenges too are ripe for further injunctive relief. Indeed, as Justice Gorsuch stated,

"[t]he Court's order today at least allows the applicants to press these points on remand." *South Bay*, 141 S. Ct. at 720; *see also id.* at 717 (Barrett, J., concurring) ("the applicants remain free to show that the singing ban is not generally applicable and to advance their claim accordingly").

Beginning on July 6, 2020 the Governor instituted a total prohibition on all singing and chanting in religious worship services while exempting music, film, and television industries from similar restrictions. And, that total prohibition continued until the Supreme Court's decisions in *Harvest Rock Church* and *South Bay* noted that discriminatory restrictions on singing and chanting would also violate the First Amendment, *Harvest Rock Church*, 2021 WL 406257, at *1, *South Bay*, 141 S. Ct. at 716, at which point the Governor lifted the total prohibition on religious singing and chanting but restricted them to 10 individuals while still exempting music, film, and television industries from any numerical restriction whatsoever.

And, though the Governor has retreated from his unconstitutional total prohibition on singing and chanting in religious worship services, even his new regime imposes discriminatory restrictions on religious worship services that are not imposed on nonreligious movie, film, and television production studios. (Dkt. 51, Answer Br. at 47.) The Governor's new guidance permits religious worship services to include "performers (but not congregants in the audience) to engage in singing, chanting, and similar vocalizations during indoor services subject to a masking

requirement in all tiers and a limit of 10 vocal performers and enhanced distancing in Tier 1." (Dkt. 51, Answer Br. at 46 (citing Cal. Dep't of Public Health, *Industry Guidance to Reduce Risks*, https://covid19.ca.gov/industry-guidance/ (drop down menu "Places of Worship and Cultural Ceremonies").) So, Plaintiffs' Churches may now have singing from a 10-person performance choir, but the congregants may not sing or chant, despite their sincerely held religious beliefs that compel them to do so. (III-ER-219, V. Compl. ¶¶ 60–64.) And, until the Governor amended his restrictions after *Harvest Rock Church* and *South Bay*, even a priest, rabbi, or pastor was prohibited from engaging in chanting Scripture or other religious texts, which is common in many religious services, including Appellants'.

But, certain nonreligious gatherings are permitted to have indoor singing and chanting **without any numerical restrictions**. (Dkt. 51, Answer Br. at 47 (noting that movie, film, and television productions are permitted to record indoor singing and chanting without any numerical limitation).) Though there appears to be a new requirement that no live audiences be present for the recording, there is nothing that restricts music, film, and television productions from having more than ten performers. Thus, yet again, the Governor has imposed discriminatory numerical caps (albeit slightly better than the previous total prohibition) that single out religious music for "especially harsh treatment." *Catholic Diocese*, 141 S. Ct. at 66.

Thus, the problem Justice Gorsuch expressed, along with Justices Thomas and Alito, is still present here. *South Bay*, 141 S. Ct. at 719. Indeed, "[i]t seems California's powerful entertainment industry has won an exemption. So, once more, **we appear to have a State playing favorites during a pandemic, expending considerable effort to protect lucrative industries (casinos in Nevada; movie studios in California) while denying similar largesse to the faithful**." *Id.* (emphasis added). "[I]f a chorister can sing in a Hollywood studio but not in her church, California's regulations cannot be viewed as neutral." *Id.* at 717 (Barrett, J., concurring). While up to ten choristers can sing in Appellants' Churches now, there is no numerical limit applicable to movie, film, or television studio singing. Thus, the singing and chanting prohibition is not neutral or generally applicable, and thus violates the First Amendment under *Catholic Diocese*, *South Bay*, and *Harvest Rock Church*.

III. *CATHOLIC DIOCESE* DEMONSTRATES THAT THE GOVERNOR'S DISCRIMINATORY RESTRICTIONS IN EVERY TIER OF THE BLUEPRINT ARE IMPOSING IRREPARABLE HARM ON APPELLANTS' CHERISHED RELIGIOUS WORSHIP SERVICES.

Catholic Diocese also compels a finding that Appellants are suffering irreparable harm as a matter of law each day the Governor's discriminatory Blueprint remains in place. No pastor, church, or parishioner in America should have to choose between worship and criminal sanction. As Justice Kavanaugh also recognized,

> **There is also no good reason to delay issuance of the injunctions** . . . issuing the injunctions 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**. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 67 (emphasis added) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

"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." *Id.* at 67–68. That alone was sufficient for this Court to find irreparable harm, and it is also true here where Appellants are subject to discriminatory percentage caps in every Tier of the Blueprint while countless other sectors and industries are wholly exempt from any numerical or percentage capacity restrictions whatsoever or entitled to more favorable capacity restrictions.

And, in *Catholic Diocese*, the Court found that 13 and 7 days were too long to suffer irreparable harm without injunctive relief. *Id.* at 68. Here, Appellants' injury is worse, as they have been suffering the unconscionable and unconstitutional injury of discriminatory worship prohibitions and restrictions for **259 days.** The time has come for the Governor's unconstitutional reign of executive discrimination

against religious worship to meet its rightful place in the dustbin of constitutional history. Appellants have suffered long enough.

IV. *CATHOLIC DIOCESE* DEMANDS A FINDING THAT APPELLANTS SATISFY THE OTHER REQUIREMENTS FOR FURTHER INJUNCTIVE RELIEF AGAINST THE GOVERNOR'S DISCRIMINATORY RESTRICTIONS.

As *Catholic Diocese* unequivocally held, where nonreligious gatherings are subject to less restrictive measures than those imposed 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 Appellants, even minimal infringements on First Amendment values constitute irreparable injury. *See 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 injury suffered by Appellants and the non-existent interest the Governor has in enforcing unconstitutional orders. Absent a preliminary injunction, Believers "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).

And, 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). The same is true here, and the public interest is best served by protecting the rights of Appellants and their Churches 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).

CONCLUSION

For the foregoing reasons, this Court should issue the second IPA against the Governor's continued discrimination in every Tier of the Blueprint.

Respectfully submitted,

Dated: April 2, 2021

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/s/ Daniel J. Schmid
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record. In addition, and in accordance with Counsel's Rule 27 Certification, counsel for Defendant–Appellee has also been served with a true and correct copy of the foregoing via electronic mail.

/s/ Daniel J. Schmid
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ADDENDUM TO PLAINTIFFS–APPELANTS' REPLY BRIEF

<table>
<tr><th>TIER 1</th><th>TIER 2</th><th>TIER 3</th><th>TIER 4</th></tr>
<tr><td colspan="4">Food packaging and processing, laundromats, warehouses, logistics, warehousing facilities, healthcare facilities, emergency services, transportation and logistics, bus stations, train stations, airports, passenger rail, energy facilities, water facilities, communications and information technology workers, radio, television and media organizations, critical manufacturing, financial services, banks, law firms, real estate firms, accounting firms, chemical manufacturing plants, defense industrial sector businesses and operations, government operations: EXEMPT FROM ALL NUMERICAL RESTRICTIONS OR PERCENTAGE CAPS.</td></tr>
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